89-1049

No. _____

In The

Supreme Court of the United States

October Term, 1989

JANET M. DANESE, Individually and as Personal Representative of THE ESTATE OF DAVID DANESE, Deceased; LOUIS DANESE, SR., DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE, and LOUIS DANESE, Individually,

Petitioners,

v.

THOMAS A. ASMAN, Individually and as Chief of Police of the City of Roseville; ROBERT PETERS, Individually and as Inspector for the City of Roseville; HOWARD HILL and FREDERICK STEIN, Individually and as Sergeants and Shift Commanders for the City of Roseville; STEVEN GOWSOSKI, ROBERT CHUCHRAN, DENNIS CARDINAL and RICHARD KENYON, Individually and as Police Officers of the City of Roseville,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDICES –

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QUESTIONS PRESENTED

I.

WHETHER A REASONABLE, WELL-TRAINED POLICE OFFICER WOULD HAVE KNOWN, IN 1982, THAT EXHIBITING DELIBERATE INDIFFERENCE TO THE CONDITION OF AN INTOXICATED, OBVIOUSLY SUICIDAL PRETRIAL DETAINEE, WHO HAD THREATENED TO COMMIT SUICIDE, VIOLATED THE CLEARLY-ESTABLISHED CONSTITUTIONAL DUE PROCESS RIGHTS OF THE DETAINEE, UNDER THE FOURTEENTH AMENDMENT, TO (a) APPROPRIATE MEDICAL CARE FOR SERIOUS MEDICAL NEEDS ARISING WHILE IN CUSTODY AND/OR (b) TO THE BENEFIT OF THE EXERCISE OF PROFESSIONAL JUDGMENT TO DETERMINE SAFE CONDITIONS OF CONFINEMENT?

II.

WHETHER REASONABLE, WELL-TRAINED POLICE SUPERVISORY OFFICIALS WOULD HAVE KNOWN, IN 1982, THAT FAILING TO MAINTAIN ANY PROCEDURES FOR SCREENING PRETRIAL DETAINEES TO DETERMINE THE RISK OF SUICIDE, FAILING TO INSTITUTE PROCEDURES TO PREVENT SUICIDES AMONG PRETRIAL DETAINEES, AND FAILING TO TRAIN SUBORDINATE OFFICERS IN SUICIDE PREVENTION AMONG PRETRIAL DETAINEES WOULD CONSTITUTE DELIBERATE INDIFFERENCE TO THE CLEARLY-ESTABLISHED CONSTITUTIONAL DUE PROCESS RIGHTS OF DETAINEES, UNDER THE FOURTEENTH AMENDMENT, (a) TO APPROPRIATE MEDICAL CARE FOR SERIOUS MEDICAL NEEDS ARISING WHILE IN CUSTODY AND/OR (b) TO THE BENEFIT OF THE EXERCISE OF PROFESSIONAL JUDGMENT TO DETERMINE SAFE CONDITIONS OF CONFINEMENT?

III.

WHETHER AN INCARCERATED, INTOXICATED PRETRIAL DETAINEE WHO MANIFESTS SUICIDAL IDEATIONS THROUGH THREATS OR OTHERWISE, HAS A CONSTITUTIONAL RIGHT TO BE PROTECTED BY

POLICE CUSTODIANS FROM SUICIDE UNDER THE STANDARDS OF *ESTELLE, YOUNGBERG* and *DeSHANEY*?

IV.

WHETHER THE COURT OF APPEALS ERRED BY IGNORING PETITIONERS' CLAIM THAT THE MICHIGAN DEPARTMENT OF CORRECTIONS' ADMINISTRATIVE REGULATIONS, PROMULGATED IN 1975 PURSUANT TO STATUTORY AUTHORITY, MANDATING THAT EACH DETENTION FACILITY MAINTAIN A DETOXIFICATION CELL PERMITTING CONTINUOUS UNHAMPERED SUPERVISION OF SUICIDAL DETAINEES, REPAIR OR REPLACE MALFUNCTIONING SECURITY EQUIPMENT, PROVIDE A BASIC PLAN FOR INMATE CLASSIFICATION, AND MEDICAL INTAKE SCREENING AND APPROPRIATE TRAINING, CREATED A LIFE AND LIBERTY INTEREST PROTECTED BY THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

LIST OF PARTIES

PETITIONERS

1. JANET M. DANESE
2. LOUIS DANESE, SR.
3. DANIEL DANESE
4. PAMELA DANESE
5. MARGARET DANESE
6. THOMAS DANESE
7. FRANCES DANESE
8. LOUIS DANESE, JR.

RESPONDENTS

1. THOMAS A. ASMAN
2. ROBERT PETERS
3. HOWARD HILL
4. FREDERICK STEIN
5. STEPHEN GOWSOSKI
6. ROBERT CHUCHRAN
7. DENNIS CARDINAL
8. RICHARD KENYON

Other parties to the proceedings in the District Court are the City of Roseville and Firefighters/EMT Keith Pelt and Terry Hawkins. These Defendants did not appear in the Sixth Circuit.

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No. _____

In The

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JANET M. DANESE, Individually and as Personal Representative of THE ESTATE OF DAVID DANESE, Deceased; LOUIS DANESE, SR., DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE, and LOUIS DANESE, Individually,

Petitioners,

v.

THOMAS A. ASMAN, Individually and as Chief of Police of the City of Roseville; ROBERT PETERS, Individually and as Inspector for the City of Roseville; HOWARD HILL and FREDERICK STEIN, Individually and as Sergeants and Shift Commanders for the City of Roseville; STEVEN GOWSOSKI, ROBERT CHUCHRAN, DENNIS CARDINAL and RICHARD KENYON, Individually and as Police Officers of the City of Roseville,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JANET M. DANESE, ET AL., ("Petitioners"), hereby petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. B, *infra*) reversing the District Court's denial of qualified immunity to the Respondent Supervisors and Police Officers, is reported at 875 F.2d 1239 (6th Cir. 1989). The August 15, 1988 Order of the Court of Appeals denying Respondents' Motion to Supplement the Record (App. C, *infra*) is unreported. The Opinions of the District Court (App.'s D and E, *infra*) are reported at 670 F.Supp. 709 (E.D. Mich. 1987) and 670 F.Supp. 729 (E.D. Mich. 1987).

JURISDICTION

The Judgment of the Court of Appeals was entered on May 26, 1989. A Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on August 18, 1989. On November 2, 1989, Justice Scalia extended the time for filing a Petition for Writ of Certiorari to and including December 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this matter are: U.S. Const, Am. XIV, § 1; 42 U.S.C. § 1983; Michigan statute M.C.L.A. 791.262, M.S.A. 28. 2322; and Michigan Administrative Code/Regulations 791.511(1); 791.553(1); 791.555(1), (7) & (8); 791.601(1), 791.603(1) & (2); 791.634(3); 791.635(2); 791.642(1); and 791.657(1). Relevant portions of these are reproduced *infra*, as Appendix F.

STATEMENT OF THE CASE

A. Facts

On November 9, 1982, Danese was arrested at approximately 2:50 a.m. by Officers Chuchran and Gowsoski for driving while under the influence of alcohol. Upon arrival at the Roseville jail, Danese cried intermittently and repeatedly made comments to Chuchran, Goswoski and Cardinal, the officer who administered the breathalizer test, that he wished he were dead.[1] He also discussed ways he should or could commit suicide and that he would, in fact, commit suicide. Danese further advised the officers that he was on medication for pain and that his physical condition rendered his detainment painful and uncomfortable.[2]

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[1] Officer Goswoski documented in his police report that at the time of arrest Danese was unable to recite the alphabet. "*Missing letters, slurred speech* . . . and failed to walk a straight line heel to toe *stumbling sideways*" (R. 170, p. 1, Police Report pp. 551-553, emphasis added). After confiscating the phenaphen with codeine, Officer Gowsoski, without asking Danese if he had taken any medication with the alcohol he had consumed, increased the charge of "OUIL" to "OUIL/Poss of Narcotic" (R. 170, p. 546(a)). Officer Gowsoski knew suicide was a risk in a lockup because he had personally cut down Robert Frank, who committed suicide in February 17, 1977.

Danese told Officer Gowsoski he was on probation, "he didn't need money . . . he was going to jail anyway," "I can't kill myself with my boots, they don't have laces." Gowsoski did not inform Sergeant Hill that Danese possessed prescription medication for pain, had been observed crying and had discussed ways he could or could not commit suicide. Officer Chuchran observed Danese with "tear in his eyes" and heard Danese remark, "They take everything away from you that you could hang yourself with," "He (other detainee) had to remove his shoe laces so he couldn't hang himself." "I wish I weren't here." When Danese was requested to remove his jewelry and boots he stated, "The ring on his right hand does not come off. If you want it off, you'll have to break my finger. I can't hang myself with it anyways." "Why? I can't hang myself with them (boots)" (R. 170, p. 555-557).

[2] The Officers confiscated the medication. Respondents admit this allegation in ¶ 284 of Petitioners' First Amended Complaint (R. 63, p. 192, ¶ 2). Danese requested a pillow because he could not lie down without pain from an old injury.

The breathalizer tests given to Danese resulted in scores of .13% and established that Danese was legally drunk. He was then placed in a holding cell, fully clothed, and out of direct view of the supervising officer. The jail did not have a detoxification cell and the television monitor had been inoperable for over one year.[3]

At approximately 5:15 a.m., Danese advised Officer Cardinal that he was going to "hang" himself.[4] The fact that Danese had threatened to "commit suicide" was communicated to Sergeant Hill by Officer Cardinal.[5] Upon being informed that Danese had threatened to hang himself, Sergeant Hill instructed Officer Cardinal, "We will have to watch him."[6] Sergeant Hill left the station without advising the only remaining supervisor, Sergeant Stein, of the threatened suicide or the need for supervision. Despite their awareness that Danese "should be watched" and "that the facilities' electrical monitoring devices were faulty," neither Hill nor Cardinal "visually inspected" Danese "at any time between 5:15 a.m., at which time Danese 'informed' them that he intended to hang himself, and 5:56 a.m.,

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[3] Chief Asman testified during his deposition he knew as early as 1977 that the Michigan Department of Corrections' Rules of Jail, Lockups and Security Camps required that he have a detoxification cell in his facility or obtain a variance. He did not construct the detoxification cell or obtain the variance (R. 107, pp. 741, 749-750). Asman further testified that he knew that the CCTV monitoring system was malfunctioning for approximately "a year, year and-a-half prior to the suicide" of David Danese, and that it was a joint decision between him and the city manager to forego having new cameras because, "They were better than nothing, but nothing that could be relied on, that was for sure" (R. 270, pp. 758-759).

[4] Respondents admit this allegation in their response to ¶ 29 of Petitioners' First Amended Complaint (R. 63, Ans. p. 191, ¶ 29).

[5] Respondents admit this allegation in their response to ¶ 30 of Petitioners' First Amended Complaint (R. 63, Ans. p. 191, ¶ 30).

[6] Respondents admit this allegation in their response to ¶ 31 of Petitioners' First Amended Complaint (R. 63, Ans. p. 191, ¶ 31).

at which time he was found hanging from the bars of his cell." [7]

Between 5:35 a.m. and 5:56 a.m., Danese hanged himself with his shirt from the crossbars of his cell. Danese hung himself 3 feet in front of a camera which covered his cell. At 5:56 a.m., Cardinal found Danese hanging by his shirt from a bar in his cell. Cardinal summoned Sergeant Stein and Officer Kenyon and they cut Danese down and called an ambulance. Despite the fact that no one knew how long Danese had been hanging, no cardio-pulmonary resuscitation (CPR) or other lifesaving techniques were attempted by any of the Respondents.[8] After he was cut down, no one loosened or removed the noose from Danese's neck. The Fire Department rescue truck arrived at 5:50 a.m., and the ambulance arrived at 6:02 a.m. No cardio-pulmonary resuscitation or other life saving techniques were attempted by either police or fire department personnel. Danese was not transported to a hospital. He was left alone, unattended in his cell with the noose around his neck until he was pronounced dead at 7:08 a.m. by a Deputy Medical Examiner.

B. Proceedings Below

On July 2, 1984, Petitioners filed their original Complaint, alleging that the Respondents had exhibited deliberate indifference to Danese's Fourteenth Amendment Due Process Rights to medical attention, personal security, and safe conditions of confinement. Petitioners based their claim on the Supreme Court's decisions of *Robinson*, *Estelle*, *Wolff*, *Bell* and *Youngberg*, *infra*, and the Sixth Circuit's decisions of *Fitzke*, *Shannon*, *Scharfenberger* and *Westlake*, *infra*, all decided before the incident in question. During the period of July 2, 1984 through August 17, 1987, extensive discovery was con-

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[7] Respondents admit this allegation in their response to ¶ 35 of Petitioners' First Amended Complaint (R. 63, Ans. p. 191, ¶ 35).

[8] Respondents admit this allegation in their response to ¶ 39 of Petitioners' First Amended Complaint (R. 63, Ans. p. 192, ¶ 39).

ducted with depositions of all parties, and numerous experts and witnesses.[9]

On August 21, 1986, Petitioners filed their First Amended Complaint. On August 22, 1986, Respondents filed a Motion to Dismiss on the grounds of qualified immunity, alleging the conduct of the Officers did not violate clearly established law.

On May 22, 1987, the District Court denied Respondents' (Gowsoski, Chuchran, Cardinal and Kenyon) Motion for Summary Judgment with respect to Petitioners' Fourteenth Amendment medical, personal security and conditions of confinement claims.

On May 22, 1987, the District Court denied the Motion of Gowsoski, Chuchran, Cardinal, Kenyon, Hill and Stein for Summary Judgment with respect to Petitioners' claim that these officers exhibited deliberate indifference to Danese's serious need to be protected from committing suicide.[10] Viewing the facts alleged by Petitioners as true, the District Court held Petitioners' claim was sufficient to state a claim under either the "gross negligence" or "deliberate indifference standard."

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[9] See "Facts Ignored by Court of Appeals" at pp. 19-24.

[10] The District Court determined that Petitioners' claim that the officers exhibited "deliberate indifference" and "gross negligence" in responding to Danese's serious medical needs precludes Summary Disposition. The District Court cited *Nishiyama* v. *Dickson County*, 814 F.2d 227 (6th Cir. 1987):

> "... a person may be said to act in such a way as to trigger a section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probably [*sic*] that harm will follow. *Id.*" (App. E, p. E-15).

The District Court also cited *Roberts* v. *City of Troy*, 773 F.2d 720 (6th Cir. 1985): "deliberate indifference exists when action is not taken in the face of a strong likelihood, rather than a mere possibility that failure to provide care would result in harm to the prisoner. *Id.* at 722." See *Matje* v. *Lies*, 571 F.Supp. 918 (S.D. Ohio 1985) at 930 quoting *State Bank of St. Charles* v. *Camic*, 712 F.2d 1140, 1146 (7th Cir. 1983).

Not only did Danese tell the officers that he was considering committing suicide, he also provided the officers with sufficient basis for believing he would carry out his threat (App. E, p. E-16).

After determining that the individual officers were liable, the District Court granted Petitioners an opportunity to amend their Complaint to allege facts in support of their claims that Asman, Peters and Hill, failed to train the police to recognize the risk of self-injury presented by individuals like Danese, and failed to institute proper procedures for handling detainees who threaten self-injury (App. E, p. E-39).

On June 19, 1987, Petitioners filed their Second Amended Complaint (App. D, p. D-5).

On July 24, 1987, Respondents renewed their Motion for Summary Disposition (App. D, p. D-6).

On August 3, 1987, the District Court vacated its prior Order Granting Petitioners Leave to Amend the entire Complaint, and granted Petitioners Leave to Amend the First Amended Complaint to add Count X, the inadequate procedures and training claims against Asman, Peters and Hill (App. D, pp. D-5 – D-6).

On August 17, 1987, Petitioners properly filed their Second Amended Complaint (App. D, p. D-6).

Respondents agreed that their renewed Motions for Summary Disposition were equally applicable to both Petitioners' Second Amended Complaints of June 19, 1987 and August 17, 1987.

On August 24, 1987, Respondents Asman, Peters, Hill and Stein filed their Motion for Judgment on the Pleadings or for Summary Judgment.

On September 10, 1987, the District Court heard oral argument on Respondents' remaining seven (7) Motions.

On September 16, 1987, the District Court denied Respondents' Renewed Motions for Summary Judgment holding that Petitioners had stated a cause of action against the individual officers for the deprivation of Danese's Fourteenth Amendment due process rights, not to be punished while in pretrial detention and to be free from unsafe confinement (App. D, p. D-14).

The District Court likewise denied Respondent Asman Peters, Hill and Stein's Motions for Summary Judgment indicating that the Complaint adequately states a claim for the violation of a clearly established law.

Additionally, the District Court held that there existed material issues of fact which precluded the award of summary disposition.

On November 4, 1987, Notice of Appeal was filed with the Sixth Circuit Court of Appeals.

On February 23, 1988, Asman, Peters, Hill and Stein filed their Appellant Briefs. On February 24, 1988, Gowsoski, Chuchran, Cardinal and Kenyon filed their Appellant Briefs. On April 26, 1988, Petitioners filed their Appellee Brief.

Respondents' Petition to Supplement the Record of April 28, 1988 was denied on August 16, 1988 (App. C).

The cause was argued on November 18, 1988.

The United States Court of Appeals for the Sixth Circuit, in a split decision (2 to 1), reversed the District Court on the ground that "the rights the district court cites as having been clearly established were not particularized rights as required by *Anderson*" (App. B, p. B-9). Judge Edwards dissented, stating: "In this case, the pre-existing body of both Supreme Court and Sixth Circuit case law cited by both Petitioners and the District Court made the unlawfulness of (Respondents') actions apparent" (App. B, p. B-14).

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on May 26, 1989, and a Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on August 18, 1989 (App. A).

On November 2, 1989, Justice Scalia extended the time for filing a Petition for Writ of Certiorari to and including December 31, 1989.

Your Petitioners now seek a Writ of Certiorari.

EXISTENCE OF JURISDICTION BELOW

The Petitioners invoked the jurisdiction of the District Court below by a Complaint under 42 U.S.C. § 1983, alleging a violation of the right to medical attention, personal security and safe conditions of confinement under the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I.

CLOSELY DIVIDED SIXTH CIRCUIT DECISION MISCONSTRUED THE "PARTICULARIZED" RIGHT REQUIREMENT OF *ANDERSON* v. *CREIGHTON* AND IS IN DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT, PREVIOUS SIXTH CIRCUIT PRECEDENT AND OTHER CIRCUIT DECISIONS REGARDING THE PROVISION OF MEDICAL CARE AND THE SCOPE OF QUALIFIED IMMUNITY.

The Sixth Circuit's closely divided, 2-to-1 decision, too narrowly construes the "particularized" requirement expressed by the Supreme Court in *Anderson* v. *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) and impermissibly expands the qualified immunity doctrine by creating a *per se* bar to police officer

liability "unless the very action" taken by the officer has "previously been held to be unlawful." [11]

By requiring "precedent establishing an unambiguous right" before officers can be held liable, the Sixth Circuit ignores both the Supreme Court's admonition against looking for a repetition of the "very action in question," *id.* at 3038, and this Court's reaffirmation that the unlawfulness need only be apparent. [12] The Sixth Circuit's requirement that "without precedent" . . . "the officers cannot be held liable" is in direct conflict with the Fifth Circuit's holding in *Partridge* [13] v.

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[11] The Sixth Circuit states:

". . . the plaintiffs and the district court in this case have not presented any cases that contradict the Fifth Circuit's holding . . . that a *constitutional duty to protect prisoners from self-destructive behavior was clearly established* at the time Gagne was arrested. As the events in Gagne took place after the events here . . . we are led to the same conclusion the court reached . . ." (App. B, p. B-10).

"Neither the plaintiffs nor the district court cite any case that *holds that police officers must detect suicidal prisoners and put them into suicide-proof facilities*" (App. B, p. B-10).

"The Court below did not cite any case showing that the officials had a *constitutional duty to determine if Danese was seriously inclined to commit suicide* and *then stop him*" (App. B, p. B-10).

"As 'neither the plaintiffs nor the district court cite any cases holding that there exists a clearly established right to these *suicide prevention facilities*'" (App. B, p. B-13).

"Without precedent establishing an *unambiguous right* to have police *diagnose* one's condition as prone to suicide, these officers cannot be held liable for not taking extraordinary measures to restrain Danese." (App. B, p. B-11).

[12] The Supreme Court held:

"This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held to be unlawful . . . but it is to say that in light of prevailing law the unlawfulness must be apparent." *Id.*, 483 U.S. 635, 107 S.Ct. 3034 at 3039.

[13] The Fifth Circuit stated:

"Although we have found no circuit case in point, district courts have interpreted *Scharfenberger* v. *Wingo*, 542 F.2d

(*concluded on page 10*)

Two Unknown Police Officers, 791 F.2d 1182 (5th Cir. 1986), and the Seventh Circuit's holdings in *Cleveland-Perdue* v. *Brotsche*, 881 F.2d 427 (7th Cir. 1989),[14] and *Doe* v. *Bobbett*, 881 F.2d 511 (7th Cir. 1989).[15]

The *Doe* Court provided:

> "In the absence of binding precedent we will look to all relevant decisional law to determine whether a right has been clearly established. In reviewing this authority we endeavor to determine whether at the time the alleged actions took place there was a substantial consensus of opinion that a course of conduct infringed on a right protected by the constitution." *Id.*, 511.

In order to access the "objective legal reasonableness" of the officers action "in light of the legal rules that were 'clearly established'" in a "more particularized and hence more relevant sense," the Court must determine if the "contours of the right" are so "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, at 3039.

(*continued from page 9*)

> 328 (6th Cir. 1976) to hold that liability under Sec. 1983 'may be predicated upon inadequate custodial care of an inmate who might harm himself.' Protecting inmates from themselves is 'an aspect of the broader constitutional duty to provide medical care for inmates.' *Guglielmoni* v. *Alexander*, 583 F.Supp. 821, 827 (D. Conn. 1984)." *Id.*, 1187.

[14] The Seventh Circuit, citing *Rakovich* v. *Wade*, 830 F.2d 1180, 1209 (7th Cir. 1988) (*En Banc*), *cert. denied*, — U.S. —, 109 S.Ct. 497, 102 L.Ed 534 (1988), held: "The absence of a controlling precedent is not fatal to plaintiffs' case." *Id.*, 431.

[15] The Seventh Circuit in *Doe* stated: "The presence of a controlling precedent is not . . . a *sine qua non* of a finding that a particular right has been clearly established within the meaning of *Harlow*." *Id.*, 511.

Here, Petitioners allege that Respondents deprived Danese of his Fourteenth Amendment Due Process right to medical attention while in custody.[16]

The decision of the Sixth Circuit is in direct conflict with the seven Supreme Court decisions cited below addressing the provision of medical care for those incarcerated or otherwise restrained: *Robinson* v. *California*, 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962); *Wolff* v. *McDonnel*, 418 U.S. 539, 555-56, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974); *Estelle* v. *Gamble*, 429 U.S. 927, 50 L.Ed.2d 251, 97 S.Ct. 258 (1976); *Youngberg* v. *Romeo*, 457 U.S. 307, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982); *Hudson* v. *Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984); *Bell* v. *Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); and *DeShaney* v. *Winnebago Social Services*, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed.2d 249 (1989).

This Court has addressed the provision of medical care to those incarcerated or otherwise restrained in terms of freedom from "punishment" under the Eighth Amendment or "gross negligence" or "deliberate indifference" manifested in responding to a detainee's needs under the Fourteenth Amendment. It has consistently held that the state has an affirmative duty to protect those in custody.

A. The Decision Of The Sixth Circuit Conflicts With Its Own Prior Opinions Regarding The Rendering Of Medical Care.

The Sixth Circuit decision in the instant matter is in conflict with its prior opinions in the following cases: *Fitzke* v. *Shappell*, 468 F.2d 1072 (6th Cir. 1972); *Shannon* v. *Lester*, 519 F.2d 76 (6th Cir. 1975) (auto accident case); *Scharfenberger* v. *Wingo*, 542 F.2d 328 (6th Cir. 1976); *Westlake* v. *Lucas*, 537 F.2d 857, 860 (6th

[16] (See pp. 13, 19-27)

Cir. 1976); *Roberts* v. *City of Troy*, 773 F.2d 720 (6th Cir. 1985) (death of pretrial detainee by suicide); and *Davis* v. *Holly*, 835 F.2d 1175 (6th Cir. 1987).

B. The Decision Of The Sixth Circuit Conflicts With The Decisions Of The Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth And Eleventh Circuits.

The Sixth Circuit decision in the instant matter is in conflict with the following decisions of other circuit courts of appeal: *Bishop* v. *Stoneman*, 508 F.2d 1224 (2d Cir. 1974); *Colburn* v. *Upper Darby Township*, 838 F.2d 663 (3rd Cir. 1988); *Bowling* v. *Godwin*, 551 F.2d 44 (4th Cir. 1977); *Partridge* v. *Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986); *Cleveland-Perdue* v. *Brotsche*, 881 F.2d 427 (7th Cir. 1989); *Finney* v. *Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974); *Garrett* v. *Rader*, 831 F.2d 202 (10th Cir. 1987); and *Waldrop* v. *Evans*, 871 F.2d 1030 (11th Cir. 1989).

Failure to respond to known medical problems can constitute deliberate indifference. *Ancata* v. *Prison Health Services, Inc.*, 797 F.2d 700 (11th Cir. 1985) *per curiam* (pretrial detainee); *accord*, *Carswell* v. *Bay County*, 854 F.2d 454 (11th Cir. 1988) (pretrial detainee); *Aldridge* v. *Montgomery*, 753 F.2d 970 (11th Cir. 1985) *per curiam*.

In the case at bar Petitioners have alleged "That . . . Asman, Peters, Hill and Stein's five (5) year refusal to implement and provide procedures for intake screening, suicide precautions, medical assessment, medical treatment, or to provide adequate supervision and housing of detainees . . . constitutes the exercise of professionally unacceptable judgment, gross negligence and a custom, policy or pattern of deliberate indifference to . . . detainees in general and Danese in particular, all of which deprived decedent without due process of law, of

his liberty interest in bodily safety, and personal security and virtually invited his demise." [17]

The Sixth Circuit misconstrues the scope of the right to medical care and safe conditions of confinement with the need to "particularize" the right itself. The District Court recognized that while "the standards by which to measure the medical attention that must be afforded pretrial detainees (i.e., 'clearly sufficient' or 'deliberate indifference') have never been spelled out . . . it is only the degree of intent, and not the right itself [which] has been anything but clearly established" (App D, p. D-11).

Petitioners contend that the right to medical attention, personal security, and institutionally safe conditions of confinement were clearly established on November 9, 1982.

In their Opinion, the Sixth Circuit provides:

> "It is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help" (App. B, p. B-9).

The Sixth Circuit's pronouncement is irrelevant. Danese told the officers he was going to "hang himself." The officers, in the exercise of their professional judgment, determined "we better watch him." Having made the determination that Danese required supervision, the officers exhibited deliberate indifference to his threat, medical and psychological condition by failing to execute their decision in a professionally acceptable manner. Danese was not watched. Officer Cardinal resumed dispatch duties, Sergeant Hill left the station to take his car home.

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[17] Reference is made to ¶ 145 of Count X of Petitioners' Second Amended Complaint.

The Sixth Circuit next provides:

> "The story might be different if the police were certain that Danese would attempt suicide and just ignored it, or if Danese had told them he needed psychological help" (App. B, p. B-10).

The Sixth Circuit's pronouncements are inconsistent and virtually guarantee police officers will be afforded absolute immunity. Having determined that "without precedent the officers cannot be held liable," and having determined there was no precedent cited, the Sixth Circuit stated an exception to the newly-pronounced rule. The Court said,

> ". . . The story might be different if the police were *certain* Danese would attempt suicide and just ignored it." (Emphasis added.)

How much more certainty is required?

Danese told the officers he needed psychological help; he said, "I'm going to hang myself." The officers decided "we better watch him." Petitioners submit that's as certain as it gets.

The officers' failure to protect Danese from self-injury, after he told them he was going to "hang himself," was in pain from a previous injury, on probation, concerned about going to jail, in debt and legally drunk constitutes both "gross negligence" and "deliberate indifference" to Danese's serious medical needs.

Not knowing how long Danese had been hanging, the officers' failure to loosen or remove the noose, open an airway, initiate CPR, or arrange transportation to the hospital while continuing CPR until relieved by a doctor, also constitutes gross negligence and deliberate indifference to an obvious medical emergency. Petitioners submit that the right to medical attention cannot be more particularized.

Petitioners' position finds support in *Estelle, supra.* This Court put to rest any consideration of the manner of the injury or the means utilized to deny medical attention, and unequivocally held:

> "Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." *Id.* at 103-105.

Accordingly, these officers must be denied qualified immunity.

The issue of whether or not the Respondents systematically and protractedly violated the rights of all detainees housed in the Roseville lockup to medical attention is hotly contested and should preclude the granting of qualified immunity in this case.

Because the Court has not heretofore considered whether there exists a constitutional right to be prevented from committing suicide under the broader constitutional right to medical attention and a considerable number of suits pending in lower courts, will turn on the resolution of this issue. Certiorari should be granted to resolve this important issue.

II.

THE SIXTH CIRCUIT ERRED BY HOLDING THAT DANESE'S "HISTORIC LIBERTY INTEREST" IN SAFE CONDITIONS OF CONFINEMENT WAS NOT "PARTICULARIZED" AS REQUIRED BY *ANDERSON.*

The Sixth Circuit decision is in direct conflict with this Court's decision in *Youngberg* v. *Romeo.*[18] In considering whether there existed an interest in safe conditions of confinement, the Court recognized:

> "In the past, this Court has noted that the right to personal security constitutes an 'historic lib-

[18] 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

> erty interest' protected substantively by the Due Process Clause.[19] And that right is not extinguished by lawful confinement, even for penal purposes." [20]

The Court concluded:

> "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed — who may not be punished at all — in unsafe conditions." *Id.* at 457 U.S. 315-316.

With a stroke of a pen, the Sixth Circuit has eradicated a pretrial detainee's right to personal security and safe conditions of confinement recognized by the United States Supreme Court as constituting an "historic liberty interest" protected substantively by the Due Process Clause.

By stating:

> "All *Youngberg* says is that involuntarily committed individuals have a right to safe confinement [and] [b]eyond this general statement, it offers no guidance as to the duty of an officer concerning suicide detention and prevention" (App. B, p. B-10),

the Sixth Circuit misconstrues the monumental importance of the Supreme Court's pronouncement in *Youngberg* and *Ingram, supra.*

The *Youngberg* decision imposes a duty upon all who house the criminally convicted, involuntarily committed or constitutionally presumed innocent pretrial detainees, to do all that is necessary in the exercise of professionally acceptable judgment to protect those

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[19] *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977).

[20] See, *Hutto* v. *Finney*, 437 U.S. 678 (1978).

incarcerated or institutionalized from harm. This is true whether the harm is occasioned by others or is self-inflicted.

Respondents by the affirmative exercise of their power removed Danese from free society and placed him in an illegal,[21] under-staffed facility with malfunctioning CCTV cameras and monitors[22] which were unfit for intended purposes. Because the facility had no detoxification cell, and no screening or emergency procedures, Danese was rendered more vulnerable to harm.

As such, Respondents had an affirmative duty under the *Estelle-Youngberg* analysis to intervene to prevent the suicide both before and after he hanged himself.

III.

WHETHER AN INCARCERATED, INTOXICATED, PRE-TRIAL DETAINEE WHO MANIFESTS SUICIDAL IDEATIONS THROUGH THREATS OR OTHERWISE, HAS A CONSTITUTIONAL RIGHT TO BE PROTECTED FROM SUICIDE, IS AN ISSUE OF NATIONAL IMPORTANCE, IMPACTING THE OPERATION OF EVERY JAIL, LOCKUP AND SECURITY CAMP IN THE NATION, NOT PREVIOUSLY ADDRESSED BY THIS COURT.

The resolution of this important issue will have a monumental impact on the Scope of Qualified Immunity affecting every law enforcement and corrections officer in the country.

The guidance of this Court is necessary in order to resolve and eliminate both inter- and intra-circuit conflicts. Petitioners assert this position both for the reasons set forth in this argument and for the reasons more thoroughly discussed in Arguments I and II above.

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[21] (Testimony that cell utilized to house Danese was illegal for all purposes.

[22] See, footnote 3.

IV.

THE SIXTH CIRCUIT ERRED BY IGNORING PETITIONERS' CLAIM THAT DANESE WAS, WITHOUT DUE PROCESS, DEPRIVED OF A LIBERTY INTEREST CREATED BY THE MICHIGAN DEPARTMENT OF CORRECTIONS' RULES FOR JAILS, LOCKUPS AND SECURITY CAMPS.

Petitioners have consistently alleged that Danese was, without due process, deprived of a liberty interest created by the Michigan Department of Corrections' Administrative Rules.[23] Review of the Michigan rules enacted seven (7) years before Danese's death and the existing case law establishes that Danese had an objective expectation that Respondents would operate, administer, staff and maintain their facility and equipment in conformity with these mandatory rules.

The Sixth Circuit Opinion did not address whether the Michigan Department of Corrections' Rules for Jails, Lockups and Security Camps, in effect on November 9, 1982, created either liberty interest protected by the Fourteenth Amendment, or constituted the exercise of professionally acceptable judgment.

Because the Sixth Circuit Opinion did not address this issue, Supreme Court guidance is necessary.

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[23] Paragraph 145 of Petitioners' Second Amended Complaint alleges:

> "That Defendants Asman, Peters, Hill and Stein's five (5) year refusal to implement and provide procedures for intake screening, suicide precautions, medical assessment, medical treatment, or to provide adequate supervision and housing of detainees, pursuant to the Department of Corrections' Rules and Regulations, and the AMA standards constitutes the exercise of professionally unacceptable judgment, gross negligence and a custom, policy or pattern of deliberate indifference to detainees in general and Danese in particular, all of which deprive decedent without due process of law, of his liberty interest in bodily safety, and physical security and virtually invited his demise."

In support of her position that the Michigan Department of Corrections' Rules for Jails, Lockups and Security Camps did create a liberty interest, Petitioner Janet Danese respectfully directs this Court's attention to the following cases: *Kentucky Department of Corrections* v. *Thompson*, 49 U.S. __, 109 S.Ct. __, 104 L.Ed.2d 506 (1989); *Hewett* v. *Helms*, 459 U.S. 469, 472, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); *Meachum* v. *Fano*, 427 U.S. 215, 227, 96 S.Ct. 2539 (1976); *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1989); *Olin* v. *Wakinekona*, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747, 75 L.Ed.2d 813 (1983); *Connecticut Board of Pardons* v. *Domschat*, 452 U.S. 458, 467, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 138 (1981); and *Moody* v. *Daggett*, 429 U.S. 78, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976), which stand for the proposition that "A state creates a protected liberty interest by placing substantive limitations on official discretion."

Sixth Circuit opinions have recognized that a state by its own actions may create liberty interests. *Washington* v. *Starke*, 855 F.2d 346 (6th Cir. 1986); *Beard* v. *Livesay*, 798 F.2d 874 (6th Cir. 1986); *Franklin* v. *Aycock*, 795 F.2d 1253 (6th Cir. 1986); *Bills* v. *Henderson*, 631 F.2d 1287, 1291 (6th Cir. 1986).

Given the importance of the issues and the aforesaid decisions and more specifically the mandatory language of the rules set forth in this Petition (see Appendix F), the Respondents cannot seriously argue that a liberty interest was not created.

V.

THE SIXTH CIRCUIT ERRED BY IGNORING FACTS RECOGNIZED BY THE DISTRICT COURT.

Effective October 2, 1953, Michigan Statute M.C.L.A. 791.262; M.S.A. 28.2322, empowered the Michigan Department of Corrections to promulgate "rules and standards to promote proper, efficient and humane

administration" of "local jails, lockups and other detention facilities." [24]

Pursuant to the aforesaid statute, the Michigan Department of Corrections did, effective September 1, 1975, "promulgate new rules for jails, lockups and security camps." These rules[25] established the minimum mandatory standards for the operation, administration, staffing and structure of local jails and lockups[26] and applied to Respondents and their facility on November 9, 1982, the date of Danese's death.[27]

Pursuant to the aforesaid rules, Respondents had a duty and Danese had an objective expectation that Respondents would, "remove any item which might be used to inflict harm to himself," [28] "provide close visual supervision for a prisoner who was potentially suicidal,"[29]

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[24] Respondents admit this allegation in their response to ¶ 74 of Petitioners' First Amended Complaint (R. 63, Ans. p. 193, ¶ 74).

[25] Reference is made to rules pertinent to these proceedings are set forth under Constitutional Statutory Provisions, at pp. F-2 – F-4, *infra*.

[26] On February 6, 1973, Perry M. Johnson, Director of the Michigan Department of Corrections in a speech to the Association of State Counties stated: "New jail rules . . . were developed by people who are professionals in corrections and county government, who understand prisons and jails, know what conditions now exist, and have a realistic understanding of what can and cannot be done." Court decisions are reflected in the structural and program changes contained in the rules which are in our collective judgment, the *minimum* standards that should be required of any facility used to detain and house human beings. I.e., Professionally Acceptable Judgment.

[27] Respondents admit this allegation in their response to ¶ 74 of Petitioners' First Amended Complaint (R.63 p. 193, ¶ 74). Chief Asman during his deposition, testified that he received the rules in 1978 and that rules applies to him and his facility (R. 207, Answer to Motion for Summary Judgment, pp. 749-750, 756-766).

[28] Respondents admit this allegation in their response to ¶ 77 of Petitioners' First Amended Complaint (R. 63, Ans. p. 194, ¶ 77.)

[29] Respondents admit this allegation in their response to ¶ 78 of Petitioners' First Amended Complaint (R. 63, p. 194, ¶ 78.)

and "ensure appropriate medical screening and health care."[30]

Asman was directed to establish and provide the Department of Corrections with "written policies concerning all checks," "written policies concerning the handling of medical emergencies" and "written policies regarding the screening of suicidal inmates." On August 4, 1977, Asman was again advised, "Provision shall be made to provide close visual supervision for an inmate who is potentially suicidal."[31] On August 11, 1977, Asman advised the Department of Corrections that "guidelines for screening prisoners for suicidal tendencies have been placed at the Booking Desk," and "all of our officers have been trained in the handling of medical emergencies." The alleged guidelines required police officers "to screen the prisoners for anything that might indicate they may have suicidal tendencies."[32] Discovery revealed that Asman lied to the Department of Corrections. Deposition testimony of all respondents revealed that contrary to Asman's written representations to the Department of Corrections, no one had received any training in the "handling of medical emergencies," intake medical screening, identifying or responding to psychiatric emergencies, identifying the characteristics of a potentially suicidal detainee or had ever attended a suicide prevention program.[33] Both Hill and Gowsoski had previously cut hanging victims down.

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[30] Respondents admit this allegation in their response to ¶ 79 of Petitioners' First Amended Complaint (R. 63, p. 194, ¶ 79.)

[31] Correspondence of August 4, 1977. R. 181 Answer to Motion for Summary Judgment, Ex. B. pp. 324-325.

[32] Correspondence of Asman to Michigan Department of Corrections. R. 181 Answer to Motion for Summary Judgment, Ex. C, pp. 329-330.

[33] Deposition Transcripts R. 207, Answer to Motion for Summary Judgment, Exhibits B.C.D., pp. 777-778, 778-790, 799-800, 808-809, 821-822, 846-847.

On November 16, 1977, the Department of Corrections again inspected the Roseville lockup and determined there were 22 violations of the mandatory rules.[34] On February 28, 1978, Asman was again informed "it may be necessary to develop a plan to phase compliance" or obtain a variance. No variance was ever requested. Asman did not construct a detoxification cell, did not screen prisoners, repair the malfunctioning CCTV equipment and continued to house prisoners in violation of the mandatory rules.

In an effort to get the Department of Corrections to deter enforcement proceedings, Asman in March 30, 1978, published five pages of Booking & Jail Procedures which required prisoner checks, screening for suicidal tendencies and transportation of sick and injured prisoners to local area hospitals.

These procedures gave shift commanders sole discretion to determine whether a detainee was suicidal and/or required medical care. Unfortunately for Danese, shift commanders were not provided any training to make a determination as to when to summon medical care or transport a suicidal detainee to a hospital.[35]

Conversely, Michigan Department of Correction lockup rules afford the officers no discretion. The rules mandated that a lockup provide a detoxification cell in which the officers were required to place "chemically impaired persons during the detoxification process."[36] On June 9, 1980, John Ireland attempted suicide in the Roseville lock-up.

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[34] Reference is made to R. 181, Answer to Motion for Summary Judgment, Exhibit D, pp. 332-336.

[35] It is unrefuted that the only training received by the Respondents was radar, breathalizer and finger printing. R. 207, Answer to Motion for Summary Judgment, p. 678.

[36] Reference is made to 791.555(1).

On June 20, 1981, the Department of Corrections advised Asman that their statistics revealed that a majority of the suicides were occurring in lockups within 2 hours of admission, alcohol was related to 7 out of 11 incidents and the person most likely to attempt suicide was a white male, in his 20s, arrested on a minor charge such as OUIL.[37]

During the period of June 20, 1980, through November 9, 1982, the Department of Corrections provided Asman with suicide statistics, suicide profiles, offered suicide prevention training,[38] stressed the need to immediately render first aid until a responsible medical authority makes a determination of death and provided the AMA Recommended Hanging Disposition Procedure.[39]

All Respondents admit that they ". . . knew or should have known the Michigan Department of Correction Rules, the Police Department Rules and Regulations and the suicide profile set forth in said regulations and training bulletins."[40]

Respondents Gowsoski, Chuchran, Cardinal and Kenyon admit that they owed the following duties to Danese:

a) The duty to inspect prisoners, and in the event that any prisoners were in need of medical or psychiatric attention, to see that appropriate treatment was provided;

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[37] Reference is made to R. 207, Answer to Motion for Summary Judgment, Exhibit F5, pp. 871-873, and a national study of jail suicides conducted by the National Center on Institutional Alternatives, Washington, D.C. (1981), titled, *And Darkness Closes In.*

[38] Respondents admit this allegation in their Response to ¶ 80 of Petitioners' First Amended Complaint, R. 63 Answer to First Amended Complaint, p. 194, ¶ 80.

[39] R. 63, Answer to First Amended Complaint, p. 194, ¶ 83.

[40] R. 63 Answer to First Amended Complaint, p. 194, ¶ 83.

b) The duty to prevent physical harm to the deceased;

c) The duty to remove all property from the deceased;

d) The duty to watch for and identify suicidal tendencies in the deceased; and

e) The duty to see that the deceased's constitutional rights were not violated. [41]

That despite the existence of the aforesaid duties, their knowledge that suicide is a known risk at lock-ups, a prior suicide and a prior suicide attempt, the mandatory jail rules, their awareness of Danese's medical and emotional condition and his threat to commit suicide the officers did nothing.

The District Court held:

> "These facts as alleged are adequate to state a claim of gross negligence. The failure to take any action to protect Danese was unreasonable and disregarded the known risk that Danese was seriously contemplating suicide. The officers must have been aware that there was a strong possibility that Danese would hang himself. Likewise, the facts alleged by plaintiffs are sufficient to sustain a claim of deliberate indifference to Danese's medical needs . . . It cannot be said that (Petitioner) can prove no set of facts in support of his claim under either standard which would entitled him to relief." (App. E, pp. E-16–E-17).

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[41] Respondents' Answer to First Amended Complaint (R. 63, p. 195, ¶ 90).

VI.

THE SIXTH CIRCUIT ERRED BY APPLYING THE WRONG STANDARD OF REVIEW TO A MOTION FOR SUMMARY JUDGMENT AND BY INCLUDING IN THEIR OPINION DISPUTED FACTS NOT PROPERLY BEFORE THE COURT.

In the case of *Nishiyama* v. *Dickson County*, 814 F.2d 277 (6th Cir. 1987), the Sixth Circuit restated the applicable standard in ruling on a motion to dismiss:

> "A motion under rule 12(b)(6) tests whether a claim has been adequately stated in the complaint. The basic requirements for a pleading are set out in rule 8(a) and call for "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." In considering a rule 12(b)(6) motion, the court must accept as true all factual allegations in the complaint. *Windsor* v. *The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). The court must deny the motion to dismiss unless it can be established beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.*, *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)."

Instead of accepting "as true all factual allegations in the complaint," the Sixth Circuit in their Opinion accepted as true, disputed facts not properly before the Court.

On August 15, 1988, the Sixth Circuit denied (Respondents') Motion to Supplement the Record (App. C).

Included in Respondents' (Appellants') Brief on Appeal were certain allegedly "undisputed" facts, to-wit: "Officer Chuchran specifically denies recalling any observation of David Danese crying that evening. He did not hear Mr. Danese make any statement that he

was going to hang himself or indicate he was going to commit suicide." (Chuchran Dep. 26-28).

The aforesaid allegedly "undisputed" facts are contained on pages 4-7 of Respondents' (Defendants-Appellants') Briefs dated February 22, 1988, and page 3 of Respondents' (Defendants-Appellants') Joint Brief in Response to Petitioners' (Appellees') Petition for Rehearing *En Banc*, dated July 25, 1989. The aforesaid facts are both disputed and not properly before the Court of Appeals as they were not part of the record of the District Court, are not contained in the Joint Appendix, and were excluded by the Court of Appeals' Order of August 15, 1988.

In their Opinion, the Sixth Circuit recognized:

> "The plaintiffs allege that, after his arrest, Danese cried intermittently and made repeated remarks to Gowsoski, Chuchran and Cardinal he wished he were dead." (App. B, p. B-3).

Rather than take these well-plead and documented facts as true, the Court of Appeals stated:

> "The officers have stated that they do not recall Danese crying or making such remarks." (App. B, p. B-3).

The only possible source of such a defense is Respondents' reference to excluded evidence, i.e., the Deposition Transcript of the Officers not cited by the Sixth Circuit.

Nonetheless, the Sixth Circuit includes the officers' denial in its Opinion.

The Sixth Circuit Opinion next recognizes, "The plaintiffs' claim that Danese discussed ways of committing suicide and said he would commit suicide" (App. B, p. B-3).

Rather than accept this well-plead and documented fact as true, the Court of Appeals recognized, "The

officers deny that he said he would commit suicide" (App. B, p. B-3).

Recognition of the officers' alleged denial that Danese said he would commit suicide ignores the admission made by the officers' in their Answer to Petitioners' (Plaintiffs') First Amended Complaint, to-wit:

> "The fact that the deceased had threatened to commit suicide was communicated to defendant Howard Hill by defendant Cardinal." (R. 38, Petitioners' First Amended Complaint, p. 28, ¶ 30).
>
> "Admitted." (R. 63 Respondents' Answer to First Amended Complaint, p. 191, ¶ 30).

By not accepting all well-plead facts as true, the Sixth Circuit announces a new rule which requires that Petitioners prove to a "certainty" that the officers knew Danese would commit suicide. Such a holding is in direct conflict with this Court's pronouncements in *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). The Court stated:

> "A police officer's immunity is qualified, not absolute. The protection can be claimed only if an offical can show that he neither 'knew or should have known that the action he took within his sphere of official responsibility would violate the constitutional right . . . affected, or . . . took action with malicious intention to cause a deprivation of a constitutional right or other injury . . .,'" *Id.*, 322.

As Respondents have admitted that the threat of suicide constitutes a "medical emergency," that suicide is a known risk in lockups and that they knew or should have known the Michigan Department of Corrections' Jail Rules and the suicide profile in those rules, Petitioners submit the Court erred by its misapplication of the law and its conclusion that the Plain-

tiffs can prove no set of facts which would entitle them to relief. Accordingly, qualified immunity should be denied.

CONCLUSION

Because the Court of Appeals' decision in this matter (1) erroneously impacts the provision of constitutionally required medical care, personal security, and safe conditions of confinement, at every prison, jail, lockup and security camp in the United States, (2) is in conflict with principles enunciated by this Court regarding the provision of necessary medical care, personal security and safe conditions of confinement, (3) incorrectly applies this Court's principles, impermissibly expanding the doctrine of qualified immunity established by this Court, and (4) is in direct inter- and intra-circuit conflict, whether there is a constitutional right to be prevented from committing suicide while incarcerated, this Court should issue of Writ of Certiorari to review the Judgment and Opinion of the United States Court Appeals for the Sixth Circuit.

Respectfully submitted,

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Attorney for Petitioners

Dated: December 23, 1989.

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER DENYING REHEARING

(United States Court of Appeals — Sixth Circuit)

(Filed August 18, 1989)

(JANET M. DANESE, ET AL., v. THOMAS A. ASMAN, ETC., ET AL., Defendants-Appellants, KEITH PELT, ET AL., Defendants — NO. 87-2039)

BEFORE: NELSON and BOGGS, Circuit Judges; and EDWARDS, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

APPENDIX B

[*MAJORITY & DISSENTING*] OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
– See, Sixth Circuit Rule 24 –

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed May 26, 1989)

(JANET M. DANESE, Personal Representative of the estate of DAVID DANESE, deceased; LOUIS DANESE; DANIEL DANESE; PAMELA DANESE; MARGARET DANESE; THOMAS DANESE; FRANCES DANESE; and LOUIS DANESE, individually, Plaintiffs-Appellees, v. THOMAS A. ASMAN, individually and as Chief of Police for the City of Roseville; HOWARD HILL, individually and as Sergeant and Shift Commander for the City of Roseville Police Department; FREDERICK STEIN, individually and as Sergeant for the City of Roseville Police Department; ROBERT PETERS, individually and as Inspector for the City of Roseville Police Department; GOWSOSKI, R. CHUCHRAN, CARDINAL, KENYON, individually and as Police Officers for the City of Roseville Police Department, Jointly and Severally, Defendants-Appellants. KEITH PELT, et al., Defendants — No. 87-2039; ON APPEAL from the United States District Court for the Eastern District of Michigan.)

Before: NELSON and BOGGS, Circuit Judges;
and EDWARDS, Senior Circuit Judge.

BOGGS, Circuit Judge, delivered the opinion of the court, in which NELSON, Circuit Judge, joined. EDWARDS, Senior Circuit Judge, (pp. 14-15)[1] delivered a separate dissenting opinion.

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[1] [*Printer's Note:* pages B-13 – B-14, *infra.*]

[*MAJORITY* OPINION]

BOGGS, Circuit Judge.

The defendants/appellants are Roseville, Michigan, police officers and police officials who appeal the district court's denial of their motion for summary judgment in the plaintiffs' suit under 42 U.S.C. § 1983. The plaintiffs seek to hold the defendants liable for the suicide, in a Roseville jail, of David Danese. The defendants contend that they should be dismissed as individual defendants on the grounds of qualified immunity. We hold that the defendants are entitled to qualified immunity and therefore reverse.

I

This case arose out of events in Roseville, Michigan in the early morning hours of November 9, 1982. The Roseville police department received a report of a suspicious car parked in a residential area. Roseville police officers (and defendants) Gowsoski and Chuchran, out on patrol, investigated the report. They discovered a car sitting out in the middle of a side street. The officers knocked on the window and woke up a man they later found out was David Danese. The officers described Danese as obviously intoxicated. The officers moved the car to the side of the road, put the keys on the floor of the car, and told Danese not to drive.

At about 2:50 a.m., the officers observed Danese driving the same car they had seen earlier. The officer pulled the car over and gave Danese some field sobriety tests. They found that Danese could not walk a straight line or name the alphabet. They arrested Danese for driving while intoxicated, handcuffed him, and took him to the Roseville police station.

When Danese arrived at the station, he was given a breathalyzer test by police officer Cardinal. He was found to have a blood alcohol content of .13%, a reading over the legal limit of .10%. The plaintiffs allege that, after his arrest, Danese cried intermittently and made repeated remarks to Gowsoski, Chuchran, and Cardinal that he wished he were dead. (The officers have stated that they do not recall Danese crying or making such remarks.) The officers searched Danese and found three black and green capsules. Danese stated that the pills were for pain he suffered due to an injury to his face. The officers confiscated the drugs. They also removed Danese's belt and shoes.

Both parties agree that Danese told a fellow prisoner that they, meaning the police, take a prisoner's shoelaces because they do not want the prisoner to commit suicide.[1] The plaintiffs claim that Danese discussed ways of committing suicide and said that he would commit suicide. (The officers deny that he said he would commit suicide.) The officers state that Danese was 'jovial.' At one point, though, Danese told Cardinal that he was $13,000 in debt and said "I wish I wasn't here." Danese called his mother, and one of the officers noticed that Danese cried toward the end of the call. Danese was then placed in a cell. The cell was not a special detoxification cell, and it had horizontal bars in the caging. The television monitor used to watch the prisoners was inoperative.

Between 5:15 and 5:25 a.m., officer Cardinal heard screaming and banging coming from one of the cells. He discovered that Danese was causing the noise. Danese told Cardinal that he wanted a cigarette. Cardinal told

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[1] The other prisoner, David Pastorisa, had stated, in a deposition, that Danese was upset about being arrested but was otherwise calm. He does not recall Danese ever asking for medical attention.

him he could not give him one due to the jail rules. Danese then said he would hang himself if he did not get one. Cardinal said he was sorry and left. He then went to his superior, Sergeant Hill, and told him what happened. Hill told Cardinal to watch Danese.

At 5:56 a.m., Cardinal went to check on the prisoners. He found Danese hanging by his shirt from a bar in his cell. Cardinal called Sergeant Stein, who had just come on duty. The two officers, along with officer Kenyon, cut Danese down and called for an ambulance. An ambulance from the fire house next door arrived a couple of minutes later, but Danese was pronounced dead within an hour.

The plaintiffs, consisting of the representatives of Danese's estate and members of his family, have sued, among others, all the police officers (Officers) mentioned here, including Gowsoski, Chuchran, Cardinal, and Kenyon, and their supervisors (Officials), including Hill, Stein, police chief Asman, and police inspector Peters. The plaintiffs sued under 42 U.S.C. § 1983, alleging numerous violations of Danese's constitutional rights.

In August 1986, these defendants filed motions to dismiss the suits against themselves as individual defendants on the grounds of qualified immunity. In May 1987, the district court denied most of these motions, allowing, however, the plaintiffs to amend one of their claims before deciding on qualified immunity. After the amendment, the defendants moved for summary judgment on the qualified immunity issue. In September 1987, the district court again found for the plaintiffs, denying that the defendants had qualified immunity. *See Danese* v. *Asman*, 670 F.Supp. 709 (E.D. Mich. 1987) and 670 F.Supp. 729 (E.D. Mich. 1987). The defendants then availed themselves of their right, pur-

suant to *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985), to file this interlocutory appeal on the immunity issue.[2]

II

The Supreme Court, following its decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), recently clarified its analysis of qualified immunity claims in *Anderson* v. *Creighton*, 107 S.Ct. 3034 (1987). The Court made clear that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 3038. (citations omitted) Thus, the plaintiff must show that the constitutional right alleged to have been violated was a clearly established right at the time of the challenged action. *Poe* v. *Haydon*, 853 F.2d 418, 425 (6th Cir. 1988).

The right in question, however, cannot be simply a generalized right, like the right to due process. *Anderson*, 107 S.Ct. at 3038. It must be clearly established in a "particularized" sense, so that "the contours of the right" are clear enough for any reasonable official in the defendants' position to know that what the official is doing violates that right. *Id.* at 3039. This particularity requirement does not mean that the very action in question has been held unlawful; it does mean, though,

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[2] The defendants also raise in this appeal the issue of whether Danese's siblings have standing to sue under § 1983. The district judge ruled that they do have such standing and also refused to certify an interlocutory appeal, sensibly holding that resolving this issue would not resolve any of the central issues of the litigation. The lower court also correctly pointed out that any verdict for these plaintiffs is subject to correction on appeal after the trial. Thus, we will not consider this issue.

that in the light of the preexisting law, the illegality of the action must be apparent. *Ibid.*

In *Anderson*, for example, the court of appeals disallowed qualified immunity, holding that the established right was the right to be free from warrantless searches unless the officers have probable cause and there are exigent circumstances. *Ibid.* The Supreme Court reversed, holding that this right was not sufficiently particularized. It must be clear that the search was illegal under the particular circumstances faced by the police, for there are many cases where the police reasonably believe that a search is legal. Police officers should not be personally liable if they act in ways they reasonably believe are lawful. *Ibid.* The relevant, fact-specific, question in qualified immunity cases is whether any official could have, in light of the preexisting law, reasonably believed that his action was lawful. *Id.* at 3040; *Poe*, 853 F.2d at 423 ("The relevant inquiry focuses on whether a reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his challenged actions.")

III

The district court held that the plaintiffs stated two causes of action against the individual officers. The first was an action for the deprivation of Danese's fourteenth amendment due process right not to be punished while in pretrial detention. The second was for the deprivation of a fourteenth amendment due process right to be free from unsafe confinement.

The plaintiffs base their first action on the Supreme Court decision in *Bell* v. *Wolfish*, 441 U.S. 520 (1979). In *Bell*, the Court held that, under due process of law, pretrial detainees may not be punished because they

have not yet been judged guilty. *Id.* at 535. One of the forms that this punishment can take is the denial of medical care. This court, as well as other circuits, have held that the Eighth Amendment cruel and unusual punishment analysis used by the Court in *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976), is applicable to pretrial detainees. *See Roberts* v. *City of Troy*, 773 F.2d 720, 722 (6th Cir. 1985). *Estelle* held that a prisoner's rights were violated if the jailers exhibited a deliberate indifference to his medical needs. *Estelle*, 429 U.S. at 104. Pretrial detainees are entitled to at least as much protection as convicted prisoners, so, as the district court concluded, *Bell* establishes that jail officials violate the due process rights of their detainees if they exhibit a deliberate indifference to the medical needs of the detainees that is tantamount to an intent to punish.

This conclusion is supported by two Sixth Circuit cases that predate *Bell* but are consistent with a deliberate indifference standard. In *Fitzke* v. *Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972), this court held that where "circumstances are clearly sufficient to indicate the need of medical attention for injury or illness", anyone who is incarcerated, whether for a serious crime or to sleep off a drunk, has the due process right to adequate medical care. This holding was reaffirmed in *Scharfenberger* v. *Wingo*, 542 F.2d 328, 330, 331 (6th Cir. 1976). The court in *Wingo* also explicitly stated that a prisoner had a due process right to adequate medical care even if his injuries were self-inflicted. *Ibid.* In sum, then, the law which existed at the time of the defendant officers' actions clearly established that pretrial detainees were, at the least, entitled to jailers

who were not deliberately indifferent to their medical needs.[3]

The district judge found that the plaintiffs' allegations constituted a claim of deliberate indifference against the police. Danese told them that he was going to kill himself and talked about methods of killing himself, but the officers did nothing. He was placed fully clothed in a regular cell. The plaintiffs contend that the situation is no different than one in which a prisoner says his leg is broken but gets no medical care. The officers, they argue, chose to ignore Danese's call for help. They conclude that it was clearly established in *Bell*, *Fitzke*, and *Wingo* that the officers owed him adequate medical care. Thus, they should be personally liable.

The district court held that the second cause of action stated by the plaintiffs was based on the deprivation of the fourteenth amendment due process right to be free from unjustified intrusions on personal security. This right is derived from the Supreme Court's decision in *Youngberg* v. *Romeo*, 457 U.S. 307, 315-16 (1982), holding that there is a liberty interest in personal security and that this right is not extinguished by either involuntary commitment or being jailed. The Court held that the Constitution requires that courts make certain that professional judgment was exercised as to the conditions of confinement; if such judgment was exercised, there is no liability under the due process clause. *Id.* at 323.

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[3] It should be noted, however, that only very recently has this court specifically applied the deliberate indifference standard in a jail suicide case, *Molton* v. *City of Cleveland*, 839 F.2d 240, 243 (6th Cir. 1988). The court, in a claim against the municipality rather than individual officers, did not find that the city had a policy causing officers to be deliberately indifferent. *Ibid.*

The district court found that the plaintiff's allegations stated a claim under this clearly established right. By ignoring Danese's threats of suicide and placing him in a regular cell with horizontal bars, as opposed to a detoxification cell, the officers, the plaintiffs contend, did not exercise professional judgment in determining whether the conditions of confinement were safe. *Youngberg*, the plaintiffs conclude, should have told them they were violating Danese's constitutional rights.

We find, however, that the rights the district court cites as having been clearly established were not particularized rights as required by *Anderson* and, thus, were not sufficient to deny the defendants qualified immunity. The "right" that is truly at issue here is the right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide. The general right to medical care, for example, is not sufficient to require a police officer to have known that he had to determine that Danese was seriously contemplating suicide and stop him from following through.

We note that the rights to medical care and physical security were established in cases that were factually quite different. For example, *Estelle*, *Fitzke*, and *Wingo* all dealt with deliberate indifference to a patient who *requested* medical care. It is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help. The right established in those cases simply would not give reasonable officers notice that their actions in this case were illegal.

Our conclusion is supported by the decision of the Fifth Circuit in *Gagne* v. *City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 3206

(1987). The court in *Gagne* held that a policeman who, in violation of a prison regulation, did not remove a belt from a detainee who later hung himself was entitled to qualified immunity. The court held that no cases were presented "suggesting that a constitutional duty to protect prisoners from self-destructive behavior was clearly established at the time Gagne was arrested." *Ibid.* As the events in *Gagne* took place after the events here and the plaintiffs and the district court in this case have not presented any cases that contradict the Fifth Circuit's holding, we are led to the same conclusion the court reached in *Gagne*.

We reach a similar conclusion as to the unsafe confinement claim. Neither the plaintiffs nor the district court cite any case that holds that police officers must detect suicidal prisoners and put them into suicide-proof facilities. The officers had no notice that they were required to place Danese in a detoxification cell with no horizontal bars. All *Youngberg* says is that involuntarily committed individuals have a right to safe confinement. Beyond this general statement, it offers no guidance as to the duty of an officer concerning suicide detection and prevention.

We conclude, then, that the district court erred in holding that qualified immunity did not apply as to the officers. The court below did not cite any cases showing that the officers had the constitutional duty to determine if Danese was seriously inclined to commit suicide and then stop him. The story might be different if the police were certain that Danese would attempt suicide and just ignored it, or if Danese had told them he needed psychological help. If a prisoner asks for and needs medical care, it must be supplied. However, in this case, the officers could have reasonably thought that they were acting legally when they treated Danese

as they would any prisoner. Without precedent establishing an unambiguous right to have the police diagnose one's condition as prone to suicide, these officers cannot be held liable for not taking extraordinary measures to restrain Danese.

IV

The district court also held that the plaintiffs stated two causes of action against the officials. The first cause of action alleges that the defendants are liable for the deprivation of Danese's rights to adequate medical care and physical security because they, as supervisors of the line officers, failed to institute any procedures regarding the screening of detainees and suicide prevention, as well as not providing training in these matters. This failure constituted deliberate indifference to Danese's medical needs.

In support of this analysis, the court cited *Hays* v. *Jefferson County*, 668 F.2d 869 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982). This court in *Hays* held that supervisors may be liable for the unconstitutional acts of their subordinates "where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable." *Id.* at 874. A plaintiff must also demonstrate a causal relationship between the failure to train and the conduct of the officers. *Ibid.* The district court held that this duty to train and establish procedures so as to not produce police misconduct was clearly established at the time of the events in this case.

We hold that *Hays* only establishes the general principle that supervisors are liable for grossly negligent or non-existent training that leads to the violation of constitutional rights. It does not say that suicide proce-

dures and training must be provided.[4] The district court's analysis is, in fact, dependent upon its conclusions as to the officers' liability. If the officers were not subject to a clearly established constitutional duty, their supervisors cannot be liable for not training them to meet such a duty.[5]

The second claim stated by the plaintiffs against the officials was based on the deprivation of Danese's due process right to personal security, as set out in *Youngberg* and described above. The plaintiffs allege that the defendants violated Danese's clearly established right to safe confinement by confining decedent in a defective building. They allege that the building should have contained a detoxification cell without horizontal bars and with a working television monitor, maintaining that the grossly negligent failure to provide these things showed that the defendants did not apply professional judgment in creating safe confinement conditions.

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[4] Indeed, in a recently decided case that does in fact deal with the training of police as to jail suicide prevention, this court held that a municipality was not liable for inadequate training. *Beddingfield v. City of Pulaski*, 861 F.2d 968 (6th Cir. 1988). The court ruled that the plaintiff had to show that the city deliberately set out to train its police officers inadequately in suicide techniques, a more difficult standard to meet than *Hays*. *Id.* at 971. In addition, the Supreme Court has recently held that a plaintiff, in order to prevail on a claim against a city for inadequate training of its police officers, must show that the failure to train amounted to deliberate indifference to the rights of the plaintiff. *City of Canton v. Harris, et al.*, 109 S.Ct. 1197, 1204 (1989). The fact that even the current law does not clearly support the plaintiffs makes far more implausible a finding that the rights claimed by the plaintiffs were clearly established at the time of Danese's death.

[5] The plaintiffs argue that certain Michigan regulations required certain suicide prevention procedures, training, and facilities and that the defendants' violation of these regulations demonstrates a breach of duty. However, the state statutes and regulations do not create federal constitutional rights. *Davis v. Scherer*, 468 U.S. 183, 194 (1984). Thus, the violation of those state mandates does not cause the offending officials to lose their qualified immunity. *Ibid.*

We must point out, much as we did with the officers, that neither the plaintiffs nor the district court cite any cases holding that there exists a clearly established right to these suicide prevention facilities. Without a showing that the particular rights claimed to be violated were clearly established in law at the time of the alleged injury, we will not find public officials acting within their discretion personally liable for the violations of these rights. No such showing has been made here. Thus, we REVERSE the denial of the defendants' motions for summary judgment and order that the claims against the individual defendants be dismissed.

[*DISSENTING* OPINION]

EDWARDS, dissenting.

Defendants in this case appeal an order denying their motion to dismiss this civil rights action on the grounds of qualified immunity. This is a case in which the widow of deceased, David Danese, brought an action against the Chief of Police of Rose Hill [*sic*], Michigan, and officers who had been on duty at the Rose Hill Jail when David hung himself in said jail. It is Janet Danese's contention that when the officers on duty had noticed that Danese was both drunk and threatening suicide, they had an obligation to provide either hospitalization or a cell block under observation which might have prevented his suicide. There had been a previous suicide in this same jail.

Judge Harvey denied qualified immunity to the defendants in this case and they appealed. *See Danese* v *Asman*, 670 F.Supp. 709 (E.D. Mich. 1987) and 670 F.Supp. 729 (E.D. Mich. 1987). In *Scharfenberger* v. *Wingo*, 542 F.2d 328, 330 (6th Cir. 1976), this court

stated: "Defendants expend considerable effort seeking to prove Scharfenberger injured himself. We regard this issue as irrelevant because a prisoner's custodians cannot lawfully deny him adequate medical care even in instances of deliberate self injury." *See also, Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976); *Roberts* v. *City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985); *Fitzke* v. *Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972).

The majority relies on the recent Supreme Court case of *Anderson* v. *Creighton*, 107 S.Ct. 3034 (1987) in reversing the court below. However, the Court also noted in *Anderson:*

> "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent." *Id.* at 3039. (Citations omitted).

In this case, the pre-existing body of both Supreme Court and Sixth Circuit case law cited above made the unlawfulness of defendants' actions apparent.

I would affirm Judge Harvey's denial of qualified immunity and remand the case for trial.

APPENDIX C

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed August 15, 1988)

(Janet M. Danese, Personal Representative of the Estate of David Danese, Deceased, et al., Plaintiff[s]-Appellees, vs. Thomas A. Asman, individually and as Chief of Police for the City of Roseville, et al., Defendants-Appellants, Keith Pelt, et al., Defendants — 87-2039)

Defendants appeal the denial of summary judgment on the basis of qualified immunity in this civil rights action. Defendants now move to supplement the record on appeal to include transcripts of the defendants' depositions which were not filed with the district court. Plaintiffs oppose the motion and move for an award of costs and attorney fees incurred in defending this motion.

Rule 10(a), Fed. R. App. P., provides that the record on appeal shall be comprised of the original documents filed with the district court, the transcript, if any, and a certified copy of the docket entries. Appellate courts may direct that a supplemental record be certified only to correct omissions or misstatements in the record for appeal, but not to introduce new evidence which significantly alters the record after a notice of appeal has been filed. Rule 10(e), Fed. R. App. P., *S & E Shipping Corp.* v. *Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982). A court of appeals may only review the decision below on the basis of the record that was before the district court. *Fassett* v. *Delta Kappa Epsilon*,

807 F.2d 1150 (3rd Cir. 1986), *cert. denied*, — U.S. —
107 S.Ct. 2463 (1987).

It is ORDERED that the defendants' motion to supple
ment the record is denied.

It is further ORDERED that the plaintiffs' motion fo
costs and attorney fees is granted.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

APPENDIX D

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed September 16, 1987)

(JANET M. DANESE, Personal Representative of the ESTATE OF DAVID DANESE, Dec'd., LOUIS DANESE, DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE and LOUIS DANESE, Ind., Plaintiffs, -vs- THOMAS A. ASMAN, Ind. and as Chief of Police for the City of Roseville, HOWARD HILL, Ind. and as Sergeant and Shift Commander for the City of Roseville Police Department, FREDERICK STEIN, Ind. and as Sergeant for the City of Roseville Police Department, ROBERT PETERS, Ind. and as Inspector for the City of Roseville Police Department, JOHN ROE, Ind. and as Lieutenant for the City of Roseville Police Department, GOWSOSKI, R. CHUCHRAN, CARDINAL, and KENYON, Ind. and as Police Officers for the City of Roseville Police Department, the CITY OF ROSEVILLE, a municipal corp., KEITH PELT, Ind. and as Rescue Truck Attendant for the City of Roseville, TERRY HAWKINS, Ind. and as Roseville Fire Department Ambulance Attendant, Jointly and Severally, Defendants — CIVIL ACTION NO. 84-9797 PH)

At a session of said Court held in the Federal Building, Port Huron, Michigan on the 16th day of September, 1987.

PRESENT: HONORABLE JAMES HARVEY,
United States District Judge.

This jail suicide action arises from the hanging of David Danese in the Roseville City Jail on November 9,

1982. Plaintiffs, the deceased's father, mother, siblings and estate, originally brought this action under 42 U.S.C. 1983 and 1985 [1].

Originally named as defendants were the City of Roseville, the Roseville Police and Fire Departments, Mayor Riesterer [*sic*], Chief of Police Asman, Inspector Peters, Sergeants Hill and Stein, officers Gowsoski, Churchran [*sic* throughout], Cardinal and Kenyon, Fire Chief Ireland and Fire Department employees Pelt, Donald Komack, Robert Komack and Hawkins. The Police and Fire Departments, Mayor Reisterer, Chief Ireland, Donald Komack and Robert Komack have been dismissed. [2]

Before the Court are the following motions:

I. The Police and Fire Departments' motion to dismiss.

II. Defendant Reisterer's motion to dismiss.

III. Defendants Asman, Peters, Hill, Stein, Gowsoski, Churchran, Cardinal and Kenyon's motion for summary judgment on the basis of qualified immunity.

IV. Defendants Asman, Peters, Hill, Stein and the City of Roseville's motion for summary judgment and to dismiss plaintiffs' fourteenth amendment claims alleging supervisory and municipal liability for failure to supervise and train Roseville police officers.

V. Defendants Asman, Peters, Hill and Stein's motion for judgment on the pleadings or for summary judgment.

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[1] The pendant state claims alleged in the complaint were dismissed in a previous order.

[2] Chief Ireland and the Komacks were dismissed by stipulation on September 23, 1986. The Police and Fire Departments and Mayor Reisterer were dismissed by stipulation on August 18, 1987.

VI. Defendants' motion to dismiss all plaintiffs except Janet Danese as personal representative of the estate of David Danese.

VII. Defendants Pelt and Hawkins' motion for summary judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The facts as alleged in plaintiffs' complaint are summarized in this Court's memorandum opinion and order issued on May 22, 1987, and need not be recounted in full here. In short, Danese was arrested at approximately 2:50 a.m. on November 9, 1982, by officers Churchran and Gowsoski for driving while under the influence of alcohol. The breathalyzer tests administered to Danese by Cardinal resulted in scores of .13% establishing that Danese was legally drunk.

Danese was subsequently placed in a holding cell allegedly secluded from the view of the officers on duty. He was found hanging from the cross bars by his shirt by Cardinal, Kenyon and Stein at 5:56 am.m. The Fire Department's rescue truck arrived at 4:59 [*sic*] a.m. and the ambulance arrived at 6:02 a.m. No life-saving techniques were applied; Danese was pronounced dead at 7:08 a.m. The following claims were alleged by plaintiffs in their first amended complaint:

<u>*SECTION 1983*</u>

Hill, Stein, Cardinal,
Churchran, Gowsoski and Kenyon

1. Failure to provide the deceased with necessary medical care under the eighth and fourteenth amendments; and
2. Failure to follow proper procedures in protecting the deceased from self-injury under the eighth and fourteenth amendments.

Asman, Peters and Hill

1. Failing to properly train the police officers and to institute proper procedures for handling detainees who threaten self-injury under the eighth and fourteenth amendments; and
2. False imprisonment and unlawful detention in a defective building under the fourteenth amendment.

City

1. Adopting a policy of inadequate training of its officers under the eighth and fourteenth amendments; and
2. Maintaining a policy of systematically violating state regulations governing the physical design of the jail under the fourteenth amendment.

Pelt and Hawkins

1. Failure to render any life-saving techniques in violation of the eighth and fourteenth amendments.

SECTION 1985

1. Conspiracy between Asman and other police officials to preclude inspection of the jail facilities by plaintiff.

See Memorandum Opinion and Order, pp. 2-4.

On May 22, 1987, the Court issued a memorandum opinion and order in response to a motion to dismiss filed by the police officers and a motion for summary judgment filed by the Police and Fire Departments, the City and Mayor Reisterer.

The Court dismissed the claims under the eighth amendment because Danese had not been convicted of a crime. With respect to Hill, Stein, Cardinal, Churchran, Gowsoski and Kenyon, the fourteenth amendment claim for failure to provide proper medical assistance was dismissed. Remaining is the fourteenth

amendment claim for failing to protect Danese from hanging himself.

With respect to the claims against Asman, Peters and Hill, the inadequate procedures claim was dismissed with leave to amend. Remaining is the fourteenth amendment defective building claim.

The inadequate procedures and defective building claims under the fourteenth amendment remain against the City, as does the claim against Pelt and Hawkins under the fourteenth amendment. The section 1985 claim was dismissed.

II.

REISTERER, POLICE AND FIRE DEPARTMENTS' MOTION TO DISMISS

The parties having agreed to dismiss each of these three defendants, these motions are DENIED AS MOOT.

III.

ASMAN, PETERS, HILL, STEIN, GOWSOSKI, CHURCHRAN, CARDINAL AND KENYON'S MOTION FOR SUMMARY JUDGMENT; ASMAN, PETERS, HILL, STEIN AND THE CITY OF ROSEVILLE'S MOTION FOR SUMMARY JUDGMENT AND TO DISMISS; ASMAN, PETERS, HILL AND STEIN'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

In dismissing plaintiffs' inadequate procedures claim against Asman, Peters and Hill, the Court granted plaintiffs ten days to amend their complaint to include factual support for their claim that inadequate police training existed and was the proximate cause of the alleged unconstitutional treatment of Danese. On June 19, 1987, plaintiffs submitted their second amended complaint. On August 4, 1987, the Court vacated its

prior order granting leave to amend because the second amendded complaint far exceeded the scope intended by the Court in its original order. Plaintiffs were ordeied to file a supplement to the original complaint containing any factual support for the inadequate procedures claim. A second amended complaint was properly filed by plaintiffs on August 17, 1987.

Subsequent to the filing of the first of plaintiffs' second amended complaints on June 19, 1987, but prior to the refiling of the second on August 17, 1987, defendants Asman, Peters, Hill, Stein, Gowsoski, Churchran, Cardinal and Kenyon filed their motion for summary judgment. The motion was filed on July 24, 1987. The motion alleges that the June 19 second amended complaint raises new issues not addressed in the first amended complaint. The defendants, however, merely incorporate their previously filed motion, and for the first time rely on *Gagne* v. *City of Galveston*, 805 F.2d 558 (5th Cir. 1986).

Also filed in the interim between June 19 and August 17, was the motion by Asman, Peters, Hill and the City of Roseville. This motion addresses the question of qualified immunity left unresolved by the Court in its opinion as a result of the dismissal of the inadequate procedures claim. This motion was also filed on July 24, 1987. The defendants in both motions have agreed that the motions are equally applicable to the August 17 second amended complaint, even though they were filed prior to the August 17 second amended complaint. Finally, Asman, Peters, Hill and Stein submitted their motion for judgment on the pleadings or for summary judgment on August 24, 1987, through newly substituted attorney Thomas E. Spencer.

Each of these three motions are primarily premised on the defense of qualified immunity. The first and last

of the three motions each raise issues already disposed of in the Court's May 22 opinion. Nevertheless, because of the confused nature of the pleadings in this matter and the complexity of the legal issues involved, the Court will consider the question of qualified immunity as it pertains to each of the claims against each of the defendants. Reconsideration of the qualified immunity defense will also allow the Court to consider the question of qualified immunity in light of *Anderson* v. *Creighton*, __ U.S. __, 55 U.S.L.W. 5092 (1987).

CARDINAL, CHURCHRAN, GOWSOSKI, KENYON, HILL AND STEIN

Plaintiffs allege that the officers' failure to protect Danese from hanging himself constitutes a violation of the due process clause of the fourteenth amendment. The Court previously held that the plaintiffs' claims may arise under two separate aspects of the liberty interest protected by the due process clause. First, a detainee's liberty interest proscribes conditions or restrictions during confinement which amount to punishment. *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). Second, a detainee also has a liberty interest in safe conditions of confinement. *Youngberg* v. *Romero*, 457 U.S. 307 (1972). *See also Davidson* v. *Cannon*, 474 U.S. 344, (Blackmun, J. Dissenting) (1986).[3] It must now be determined whether these two rights the officers are alleged to have violated were "clearly established" at the time of Danese's death.

The Court again begins with the standard set forth by the Supreme Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982):

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[3] Plaintiffs did not allege a procedural due process claim. See this Court's previous opinion at p. 18 n. 9.

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

This standard was recently affirmed in *Anderson*: "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, *Harlow*, 457 U.S. at 819; assessed in light of the legal rules that were 'clearly established' at the time it was taken, *id.*, at 818." *Anderson*, 55 U.S.L.W. at 5093.

The Court in *Anderson* also held that the mere assertion of a clearly established right, at least in the context of the fourth amendment, is insufficient to defeat the qualified immunity defense. The Eighth Circuit Court of Appeals had rejected the qualified immunity defense finding that the assertion that the general right Anderson was alleged to have violated — the right to be free from warrantless searches of one's home absent probable cause and exigent circumstances — was clearly established.

The majority rejected this general application of the qualified immunity defense: "It simply does not follow from the conclusion that it was fairly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable." *Anderson*, 55 U.S.L.W. at 5093.

The Court determined that the right at issue must be more "particularized", and stated the proper question

which should be asked in determining the viability of the qualified immunity defense in the context of the fourth amendment:

> The relevant question in this case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officer possessed.

Id.

Applying the reasoning in *Anderson* to this case, in order to determine whether a reasonable officer could have believed that the failure to take any precautionary measures to protect Danese from injuring himself did not violate the due process clause, both the clearly established law on November 9, 1982, and the information possessed by the officers must be determined.

A. Liberty Interest in Freedom from Punishment

It was recognized as far back as 1972 in this circuit that "fundamental fairness and the most basic conception of due process mandate that medical care be provided to one who is incarcerated and may be suffering from serious illness or injury." *Fitzke* v. *Shappel*, 468 F.2d 1072, 1076 (6th Cir. 1972). The Court in *Fitzke* held that even if the incarceration is merely for the night to "dry out" in the local drunk tank, "where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the deprivation of constitutional due process." *Id.* (Citations omitted). The "clearly sufficient" standard was affirmed by the Sixth Circuit

in *Scharfenberger* v. *Wingo*, 542 F.2d 328 (6th Cir. 1976).[4]

Although *Fitzke* and *Scharfenberger* involved the deprivation of medical care for physiological as opposed to psychological illness, it has long been recognized that the responsibility to provide medical care extends to psychological illnesses. The Fourth Circuit in 1977 held:

> In the instant case, petitioner seeks psychological diagnosis and treatment. We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart. Modern science has rejected the notion that mental or emotional disturbances are the products of afflicted souls, hence beyond the purview of counseling, medication and therapy.

Bowring v. *Godwin*, 551 F.2d 44, 47 (4th Cir. 1977). Other courts have reached the same conclusion. *See, e.g. Campbell* v. *McGruder*, 580 F.2d 521, 547-550 (D.C. Cir. 1978) (relying on *Fitzke* in support of plan for psychiatric help); *Ruiz* v. *Estelle*, 503 F. Supp. 1265, 1345 (S.D. Tex. 1980); *Cushing* v. *Tetter*, 478 F. Supp. 960, 968, 969 (D. R.I. 1979) (return of plaintiff to former

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[4] *Scharfenberger* eliminated the contention that the holding in *Fitzke* is inapplicable when the plaintiff's injury is self-inflicted. In *Scharfenberger*, it was unclear whether the amputation of the plaintiff's right arm was necessitated by an improper injection by infirmary staff or by the plaintiff himself. The court held:

> "Defendants expend considerable effort seeking to prove that Scharfenberger injured himself. We regard this issue as irrelevant because a prisoner's custodians cannot lawfully deny him adequate medical care even in instances of deliberate self injury."

Id. at 330. This holding was followed in *Matje* v. *Leis*, 571 F. Supp. 918, 930 (S.D. Ohio 1983), a jail suicide involving facts similar to those present in this case.

military unit would display deliberate indifference because it would create a risk of suicide).[5]

The "clearly sufficient" standard applied to psychological illnesses was not altered by the Supreme Court's decision in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), or *Bell* v. *Wolfish*, 441 U.S. 520 (1979). The deliberate indifference standard enunciated in *Estelle* is applicable to the eighth amendment rights of an individual convicted of a crime. The eighth amendment, and thus the "deliberate indifference" standard is inapplicable to a detainee not convicted of a crime. *Whitley* v. *Albers*, 475 U.S. 312 (1986). The Fifth Circuit, in *Jones* v. *Diamond*, 636 F.2d 1364, 1378 (5th Cir.), *cert. dismissed sub. nom.*, *Ledbetter* v. *Jones*, 435 U.S. 911 (1981), recognized that "the standard by which to measure the medical attention that must be afforded pretrial detainees have never been spelled out." *Id.*

At the very least, it was clearly established after *Estelle* that the deprivation of a detainee's need for medical attention was actionable under the due process clause if the deprivation was a result of deliberate indifference on the part of a government official. It has long been recognized that detainees, not yet convicted of any crimes, retain at least those constitutional rights enjoyed by convicted prisoners. *Wolfish*, 441 U.S. at 545. Indeed, some courts, including the Fifth Circuit in *Diamond*, 636 F.2d at 1368, have concluded that the due process clause accords pretrial detainees rights not enjoyed by convicted inmates. *Id. See also Cudnick* v. *Kreiger*, 393 F. Supp. 305, 300-311 (N.D. Ohio 1974).

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[5] That each of these cases involved convicted prisoners as opposed to mere detainees is irrelevant in light of the Supreme Court's teaching that those not convicted of a crime possess at least as many rights under the due process clause that one convicted of a crime possesses under the eighth amendment.

Although *Wolfish* established an analytical framework for determining when a detainee's liberty interest under the due process clause is infringed by the conditions of confinement, nothing in that decision alters the "clearly sufficient" standard espoused by *Fitzke* and *Scharfenberger*. Although it may have been unclear exactly how the end result of application of the *Wolfish* analysis to the question of medical attention would compare to the "clearly sufficient" or "deliberate indifference" standards, *see, e.g., Hamm* v. *DeKalb County*, 724 F.2d 1567, 1572-1574 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1492 (1986); *Roberts* v. *City of Troy*, 773 F.2d 720 (6th Cir. 1985) (*en banc*); only the degree of intent, and not the right itself has been anything but clearly established. In accordance with the teaching in *Wolfish* itself, a detainee is entitled to at least the protection offered under *Estelle*. The only question left by *Wolfish* was whether the more plaintiff-oriented "sufficiently clear" standard or the "deliberate indifference" standard would result from application of the *Wolfish* analysis.

In sum, at the time of Danese's hanging on November 9, 1982, it was clearly established that the due process clause at least proscribed a governmental official from denying a detainee medical attention for psychological illnesses where that denial is a result of deliberate indifference.[6] That the very action or lack of

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[6] Plaintiffs contend that the rules promulgated by the Michigan Department of Corrections relative to jails and lockups create a liberty interest under the fourteenth amendment. Except in the context of a procedural due process claim, which has not been alleged here, this simply is not so. *Davis* v. *Scherer*, 468 U.S. 183, 467, n. 11 (1984). *See also Gagne*, 805 F.2d at 560 n. 2.

Allegations regarding the breach of a statute or regulation, however, may not be completely irrelevant to an official's eligibility for qualified immunity, or if qualified immunity is inapplicable, to

(*concluded on page D-13*)

action in question — here the failure to take precautionary steps to protect Danese from injuring himself — has not been previously held unlawful is not dispositive. The unlawfulness must only be apparent in light of preexisting law. *Anderson*, 55 U.S.L.W. at 5093.

Gagne v. *City of Galveston*, 805 F.2d 558 (5th Cir. 1986), *cert. denied sub. nom.*, *Gagne* v. *Putnam*, — U.S. —, 107 S.Ct. 3266 (1987), does not alter this conclusion. In *Gagne*, the Fifth Circuit reversed the district court's denial of the arresting officers' motion to dismiss based on qualified immunity. In holding that the officer was under no clearly established constitutional duty to discover the prisoner's suicidal tendencies or to deprive him of the means of killing himself, the court cited the lack of authority for such a duty. The court also pointed out that the possible existence of such a duty was only recently raised in the Fifth Circuit in *Partridge* v. *Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986) (*en banc*).

Gagne is inapplicable for two reasons. First, as plaintiffs point out, it is factually distinguishable. Gagne made no threats or references to suicide or otherwise gave the officers reason to believe that he might contemplate suicide. More importantly, however, the court in *Gagne* explicitly limited its discussion to Fifth Circuit precedent. *Gagne* failed to take into account the decisions discussed above, and dismissed the claim in a conclusory fashion.

(*continued from page D-12*)

the questions of liability itself. Violation of state statutes or regulations could conceivably be indicative of a violation of a constitutional right, where as here, the central issue is whether the officers acted with deliberate indifference. *Cf. Gagne*, 805 F.2d at 560. Because the Court has determined that the qualified immunity defense is not applicable based on the conduct of Danese himself, the Court need not consider whether the officers' alleged failure to follow the regulations also portrayed deliberate indifference to Danese.

Having determined the clearly established law at the time of Danese's death, the officers' knowledge of Danese's propensity to commit suicide must be ascertained.[7]

Because the qualified immunity issue has been raised by defendants under both Rule 12 and Rule 56, the Court will address the issue under both rules.

Under Rule 12(b)(6), the facts alleged in the complaint must be accepted as true. *Nishiyama* v. *Dickson County*, 814 F.2d 277, 279 (6th Cir. 1987). As the Court's previous opinion indicates on pp. 15-16, plaintiffs sufficiently pleaded a violation of clearly established law within the context of a motion to dismiss. The complaint alleges conduct sufficient to put a reasonable officer on notice of Danese's suicidal tendencies such that the failure to act would constitute deliberate indifference.

The fact that plaintiffs' complaint adequately states a claim of clearly established law does not end the inquiry, however. A motion for summary judgment may still be appropriate. "Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Mitchell*,

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[7] Justice Scalia, writing for five other members of the Court, emphasized in *Anderson* that determination of the information possessed by a searching officer does not reintroduce into the analysis an inquiry into the officials subjective intent. *Anderson* nevertheless recognizes that determination of an officer's knowledge does involve a question of fact, just as *Mitchell* recognizes that whether the officer actually committed the alleged unlawful act is a question of fact. *Mitchell*, 472 U.S. at 526. The applicable standard by which these facts are determined depends, of course, on whether the defense is raised in the context of a motion to dismiss under F.R. Civ. P. 12(b)(6) or for summary judgment under F.R. Civ. P. 56.

472 U.S. at 526. Whether defendants committed the alleged unlawful actions, at least in the traditional sense, is not at issue here. Rather, the question of fact which might have been resolved through discovery in this matter is the extent to which Danese had warned the officers that he might commit suicide.

In ruling on a motion for summary judgment, the Court need not accept the allegations as true, but must merely construe the evidence and the reasonable inferences therefrom in the light most favorable to the non-moving party. *Smith* v. *Hudson*, 600 F.2d 60 (6th Cir. 1979). Even viewed under this more lenient standard, the Court believes that at the very least there is a genuine issue of fact as to the tone and nature of Danese's conduct in general. Most of plaintiffs' allegations regarding Danese's conduct are not in dispute. Nevertheless, without the benefit of the relevant testimony, other conduct by Danese alleged by defendants does cast into doubt the overall demeanor of Danese and his conduct as alleged by plaintiffs. For these reasons, the officers' claim of qualified immunity relative to this aspect of the due process claim must be denied.

B. Liberty Interest in Personal Security

The parties have not challenged the Court's previous holding that the qualified immunity defense is inapplicable to plaintiffs' due process claim under *Ingraham* v. *Wright*, 430 U.S. 651 (1977), and *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). Accordingly, for the reasons expressed in pp. 17-18 and 26 of the May 22 Memorandum Opinion and Order, the officers' qualified immunity defense relevant to this aspect of the due process clause also fails.

ASMAN, PETERS, HILL & STEIN

Plaintiffs allege both a supervisory, as well as a direct claim against defendants Asman, Peters, Hill and Stein.

A. Inadequate Training and Procedures Claim

Plaintiffs allege in their second amended complaint that the four supervisory officers failed to provide any training or establish any procedures regarding intake screening and suicide precautions. Plaintiffs allege that the failure to provide any training or establish any procedures in light of a past suicide in 1977 and repeated offers by state officials to train Roseville police officers constitutes deliberate indifference and gross negligence.

Assuming the facts alleged by plaintiffs to be true, the complaint adequately states a claim of a violation of a clearly established law. The relevant standard regarding supervisory liability in a section 1983 action is discussed at pp. 19-20 in the May 22 Memorandum Opinion and Order. In short, *Hays* v. *Jefferson County*, 668 F.2d 869 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982), requires a finding of extreme recklessness or gross negligence in training in order to sustain a claim of supervisory liability under section 1983. *Id.* at 874. There must also exist a causal relationship between the failure to train and the conduct of the police officers. *Rizzo* v. *Goode*, 423 U.S. 362, 370-371 (1976).

The law established in *Rizzo* and *Hays* was clearly established in November 1982. *Rizzo* was decided in 1976, and *Hays* was decided in January 1982. *See also Scott* v. *deLeon*, 603 F. Supp. 1328, 1333-1334 (E.D. Mich. 1985). The facts alleged in plaintiffs' complaint, if taken as true, adequately state a claim of gross negligence. Additionally, the alleged conduct could

easily be construed as the moving force behind the deprivation of Danese's liberty interest.

Defendants' qualified immunity defense also fails if considered in the context of a motion for summary judgment. On p. 32 of its previous opinion, this Court set forth the questions of fact still remaining which preclude the Court from granting a motion for summary judgment on behalf of the City. These issues of fact are also present with respect to Asman, Peters, Hill and Stein, and foreclose the granting of summary judgment on this issue.

2. [sic, B] Defective Building Claim

The Court's previous analysis of this claim on pp. 21-23 and 26 is unchallenged and remains applicable. Qualified immunity is not applicable.

CITY OF ROSEVILLE

On pp. 28-33 the Court provided a lengthy discussion of the principles of municipal liability and concluded that questions of fact remain for trial in both the inadequate training and procedures and defective building claims. Nothing in the City's renewed motion persuades the Court to change its previous decision.

III.

DEFENDANTS' MOTION TO DISMISS ALL PLAINTIFFS EXCEPT JANET DANESE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID DANESE

Defendants first contend that Danese's parents and siblings lack standing to sue since they fail to allege in the complaint the deprivation of a constitutional right personal to themselves. It is beyond dispute that plaintiffs may only recover for deprivation of their own constitutional rights and not the rights of David. *See,*

e.g., Trejo v. *Wattles,* 636 F. Supp. 992 (D. Colo. 1985). A failure to assert a personal constitutional injury would result in a lack of standing. *Trujillo* v. *Bd. of City Comm. of City of Santa Fe,* 768 F.2d 1186, 1187 (10th Cir. 1985).

Plaintiffs do not dispute the omission of allegations of direct injury, but argue that they should be permitted to amend the complaint and allege the deprivations of their liberty interest in familial relationships. The Sixth Circuit recently stated the applicable standards a district court must apply in determining whether to grant leave to amend:

> Rule 15(a) of the Federal Rules of Civil Procedure requires that leave to amend "shall be freely given when justice so requires." The district court also abuses its discretion in not granting leave to amend unless there is some apparent or declared reason not to allow the amendment. *Foman* v. *Davis,* 371 U.S. 178, 187, 88 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Marx* v. *Centran Corp.,* 747 F.2d 1536, 1550 (6th Cir. 1984), *cert. denied,* __ U.S. __, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985). Such reasons may include undue delay, bad faith or dilatory motives by the movant, undue prejudice to the opposing party by allowing the amendment, or futility of amendment. 371 U.S. at 182, 83 S.Ct. at 230.

Consumers Petroleum Co. v. *Texaco, Inc.,* 804 F.2d 907, 913 (6th Cir. 1986). *See also Janikowski* v. *Bendix Corp.,* No. 85-1643, slip op. at 12 (6th Cir. July 9, 1987).

In this case, plaintiffs are not guilty of undue delay, bad faith or dilatory motives. Additionally, defendants would not be unduly prejudiced by allowing such an amendment. Such an amendment will not delay trial.

Finally, whether leave to amend would be futile leads to defendants' other argument — that no such constitutional right exists. Because the Court concludes that a liberty interest in familial relationships does exist under the due process clause of the fourteenth amendment, plaintiffs are entitled to amend their complaint accordingly.

The Supreme Court has never directly considered whether family members have a liberty interest in the continued life of a relative. In two cases in which the issue might have been addressed, the Court dismissed certiorari as improvidently granted. *See Jones* v. *Hildenbrandt*, 191 Colo. 1, 550 P.2d 339 (1976), *cert. dismissed*, 432 U.S. 183 (1977); *Espinoza* v. *O'Dell*, 633 P.2d 455 (Colo. 1981), *cert. dismissed*, 456 U.S. 430 (1982).

The Supreme Court has, however, recently clarified the right to enter into and maintain intimate or private relationships in *Roberts* v. *United States Jaycees*, 469 U.S. 609 (1984), and *Bd. of Dir. of Rotary Int'l* v. *Rotary Club of Duarte*, __ U.S. __, 55 U.S.L.W. 4606 (1987). In *Roberts*, the Court upheld against first amendment challenge application of the Minnesota Human Rights Act to compel the Jaycees to accept women as regular members. The Court's analysis in *Roberts* was summarized in *Rotary Club:*

> As we observed in *Roberts*, our cases have afforded constitutional protection to freedom of association in two distinct senses. First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in pro-

> tected speech or religious activities. In many cases, government interference with one form of protected association will also burden the other form of association. In *Roberts* we determined the nature and degree of constitutional protection by considering separately the effect of the challenged state action on individuals' freedom of private association and their freedom of expressive association.

Rotary Club, 55 U.S.L.W. at 4608.

In *Rotary Club*, the issue before the Court was whether a California statute requiring California Rotary Clubs to admit women members violated the first amendment. The Court applied the two-fold inquiry developed in *Roberts* and held there was no first amendment violation. Only the freedom of intimate association is at issue in this case.

The Court in *Rotary Club* described the freedom of intimate association as follows:

> [T]he freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Such relationships may take various forms, including the most intimate. *See Moore* v. *East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality opinion). We have not attempted to mark the precise boundaries of this type of constitutional protection. The intimate relationships to which we have accorded constitutional protection include marriage. *Zablocki* v. *Redhail*, 434 U.S. 374, 383-386 (1978); the begetting and bearing of children, *Carey* v. *Population Services International*, 431 U.S. 678-686 (1977); child rearing and education, *Pierce* v. *Society of Sisters*,

> 268 U.S. 510, 534-535 (1925); and cohabitation with relatives, *Moore* v. *East Cleveland, supra*, at 503-504. Of course, we have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the First Amendment protects these relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.' *Roberts* v. *United States Jaycees, supra*, at 619-620.

Id.

The Court then described the proper analysis for determining whether constitutional protection is warranted:

> [I]n *Roberts* we observed that '[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.' 468 U.S. at 620 (citing, *Runyon* v. *McCrary*, 427 U.S. 160, 187-189 (1976) (Powell, J., concurring). In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. 468 U.S., at 620.

Id.

In *Trujillo*, the Tenth Circuit held that the mother and daughter of the deceased had a constitutionally

protected interest in their relationship with their son and brother. *Trujillo,* 760 F.2d at 1184. The court concluded that the parental and sibling relationship was well within the protected range described in *Jaycees.*

> We note that the familial relationships in this case do not form the outer limits of protected intimate relationships. As the Court in *Jaycees* further explained, 'a broad range of human relationships . . . may make greater or lesser claims to constitutional protection . . . ,' requiring 'a careful assessment of where [a particular] relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.' 104 S.Ct. at 3251. Those characteristics which would indicate a protected association include smallness, selectivity, and seclusion. *Id.* at 3250. We need not make such an assessment here, since the relationships at issue clearly fall within the protected range.

Id. at 1189 n. 5.

The reasoning in *Trujillo* is applicable to this case, especially in light of the Supreme Court's recent affirmation of *Jaycees* in *Rotary Club.*

Although some courts have rejected the existence of such a constitutional right with respect to both parents and siblings, *see, e.g., Ortiz* v. *Burgos,* 807 F.2d 6 (1st Cir. 1986), and others with respect to just siblings, *see, e.g., Bell* v. *City of Milwaukee,* 746 F.2d 1205, 1242-48 (7th Cir. 1984), none of these decisions consider the *Jaycees-Rotary Club* analysis.[8]

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[8] Both the Ninth and Eighth Circuits have upheld a parent's right of intimate association in these circumstances. *Kelson* v. *City*

(*concluded on page D-23*)

Plaintiffs are accordingly entitled to amend their complaint to allege deprivation of each's constitutional right of intimate association with Danese. These allegations are to be included as Count XI and shall not exceed three pages. Former Count XI shall be changed to Count XII.

V.

DEFENDANTS' PELT AND HAWKINS' MOTION FOR SUMMARY JUDGMENT

Defendants contend that summary judgment is appropriate for two reasons. First, Pelt and Hawkins assert that because the acts complained of were *ultra vires* and thus not within the scope of their municipal position, they were not acting "under color of any statute, ordinance, regulation, custom or usage of any State. . . . ' Defendants rely on *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), and *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985), in support of this argument.

This first argument suffers from two basic flaws. First, a municipal custom or policy need only be proved if the defendant is a municipality or local government. It is irrelevant when the defendants, as in the case here, are only employees.

It is true that in order to establish a violation under section 1983, one of the elements which must be proved is that the defendants were acting under color of state law when they committed the alleged unconstitutional act. *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

(*continued from page D-22*)

of Springfield, 767 F.2d 651 (9th Cir. 1985); *Mattis* v. *Schnarr*, 502 F.2d 588 (8th Cir. 1974). Neither decision was based upon the principles enunciated in *Jaycees* and *Rotary Club*.

Defendants' argument that these acts were *ultra vires* and thus not under color of state law, however, was rejected in the seminal case of *Monroe* v. *Pape*, 365 U.S. 167, 171-187 (1961).

Second, defendants contend that gross negligence is insufficient to trigger the protection of the due process clause; alternatively they argue that the acts alleged by plaintiffs do not rise to the level of gross negligence.

As this Court recognized on pp. 34-36 of its previous opinion, the only possible claim against Pelt and Hawkins is under the substantive aspect of the due process clause. Although it is true that the Supreme Court has explicitly stated that allegations of mere negligence are insufficient to state a claim under the due process clause, the Court specifically reserved the question whether "something less than intentional conduct, such as reckless or 'gross negligence', is enough to trigger the protection of the Due Process Clause." *Daniels* v. *Williams*, 474 U.S. 327 n. 7 (1986). In *Nishiyama*, 814 F.2d at 281-83, the Sixth Circuit held that gross negligence is sufficient to constitute a "deprivation" of due process. The gross negligence standard under *Nishiyama* is thus applicable.

Applying the gross negligence standard, defendants have failed to carry the burden of proving that no issue of fact remains relative to whether their conduct was in accord with state procedure or was merely negligent. The Court is unable to say, without knowledge of the proper procedures which should have been followed in attending to Danese, that Pelt and Hawkins' actions do not rise to the level of gross negligence.

Accordingly, defendants' motion is DENIED.

IT IS SO ORDERED.

/s/ JAMES HARVEY
United States District Judge

APPENDIX E

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed May 22, 1987)

(JANET M. DANESE, Personal Representative of the ESTATE OF DAVID DANESE, Dec'd., LOUIS DANESE, DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE and LOUIS DANESE, Ind., Plaintiffs, -vs- THOMAS A. ASMAN, Ind. and as Chief of Police for the City of Roseville, HOWARD HILL, Ind. and as Sergeant and Shift Commander for the City of Roseville Police Department, FREDERICK STEIN, Ind. and as Sergeant for the City of Roseville Police Department, ROBERT PETERS, Ind. and as Inspector for the City of Roseville Police Department, JOHN ROE, Ind. and as Lieutenant for the City of Roseville Police Department, GOWSOSKI, R. CHUCHRAN, CARDINAL, and KENYON, Ind. and as Police Officers for the City of Roseville Police Department, ROSEVILLE POLICE DEPARTMENT, JEANNIE RIESTERER [*sic* throughout], Ind. and as Mayor of the City of Roseville and the CITY OF ROSEVILLE, a municipal corp., THE ROSEVILLE FIRE DEPARTMENT, KEITH PELT, Ind. and as Rescue Truck Attendant for the City of Roseville, TERRY HAWKINS, Ind. and as Roseville Fire Department Ambulance Attendant, Jointly and Severally, Defendants — CIVIL ACTION NO. 84-9797 PH)

At a session of said Court held in the Federal Building, Port Huron, Michigan on the 22nd day of May, 1987.

PRESENT: HONORABLE JAMES HARVEY,
United States District Judge.

This case arises from a November 9, 1982, incident in which David Danese committed suicide by hanging himself in a cell at the Roseville City Jail following his arrest for driving while under the influence of alcohol. Plaintiffs bring this suit on their own behalf. Janet M. Danese also brings suit as the mother of David Danese and the administrator of her son's estate. Plaintiffs seek relief pursuant to 42 U.S.C. §§ 1983 and 1985, and also seek an injunction compelling defendants to comply with various Roseville Police Departmental and Michigan Administrative Code Rules.[1]

Named as defendants are the City of Roseville, the Roseville Police anhd Fire Departments, the Mayor of Roseville, Jeannie Riesterer, Chief of Police Thomas Asman, Inspector for the Roseville Police Department, Robert Peters, Police Sergeants Howard Hill and Frederick Stein, and officers Gowsoski, Churchran [*sic* throughout], Cardinal and Kenyon.[2] Before the Court is a motion to dismiss on behalf of all eight police officers and a motion for partial summary judgment or dismissal filed by Mayor Riesterer, the City of Roseville and Roseville Fire Department. The Roseville Police Department has also filed a motion to dismiss, adopting by reference the brief in support of the motion filed by the Mayor, City and Fire Department.

I.

Plaintiffs' ten-count complaint contains 151 paragraphs and fails to delineate which allegations are alleged against whom and under what constitutional

[1] The complaint also sets forth various pendant state law claims. These claims were dismissed in a Memorandum Opinion and Order issued on April 1, 1987.

[2] Various Fire Department employees have been dismissed by stipulation of the parties.

provisions. Plaintiffs' apparent attempt not to inadvertently omit any potential claim renders the complaint almost unreadable. Nevertheless, a generous reading of the complaint in its entirety indicates that plaintiffs allege various constitutional claims under section 1983, as well as a claim under section 1985.

Plaintiffs allege claims under the eighth and fourteenth amendments against officers Hill, Stein, Cardinal, Churchran, Gowsoski and Kenyon for failing to provide the deceased with necessary medical treatment and to follow proper procedures in protecting the deceased from self-injury. (Am. Compl., ¶¶ 57-68, 123.)[3]

Plaintiffs allege that Reisterer, Asman, Peters and Hill violated both the eighth and fourteenth amendments by failing to properly train the police officers to recognize the risk of self-injury presented by individuals like Danese and because they failed to institute proper procedures for handling detainees who threaten self-injury. (Am. Compl., ¶¶ 121, 123 and 125). Plaintiffs further allege that Reisterer, Asman, Peters and Hill violated Danese's liberty interest in the fourteenth amendment by (1) wrongly imprisoning him against his will, and (2) unlawfully detaining him in a defective building in violation of several rules promulgated by the Michigan

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[3] Although plaintiffs allege a claim under the fifth amendment in paragraph 123 of the complaint and under the fourth and ninth amendments in paragraph 20, the complaint does not support claims under any of these three amendments. Nor do plaintiffs attempt to add any support in any of the pleadings or their responses to the various motions filed by defendants.

Department of Corrections. (Am. Compl., ¶¶ 103-109, 123, 124).[4]

Plaintiffs' attempt to hold the City and Police Department liable under (1) the eighth and fourteenth amendments for establishing a policy of inadequate training of the police officers (Am. Compl., ¶¶ 66-69), and (2) the fourteenth amendment for maintaining a policy of systematically violating state regulations governing the physical design of the lockup. (Am. Compl., ¶¶ 69-71, 103-109).

Plaintiffs allege that the Fire Department's failure to adequately train its employees in life saving techniques and its custom and policy of indifference ratified and condoned the deliberate indifference its employees displayed towards the deceased in failing to render any C.P.R. or other treatment which might have saved Danese's life. (Compl., ¶¶ 115-118).

Finally, plaintiffs allege that Asman and various other defendants conspired to cover up the events which led to

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[4] Count VI, captioned "False Imprisonment," contains more than just a state tort law claim for false imprisonment. Also included is a claim that the deceased was denied his liberty or freedom of movement by being held in a defective building. Although Count VI does not explicitly refer to the fourteenth amendment, plaintiffs' reference to a liberty interest is clearly a due process claim under the fourteenth amendment. Accordingly, although paragraph 123 refers to the eighth, as well as, the fourteenth amendments, the reference to the eighth amendment must be read as referring to the inadequate training and failure to establish proper procedures claims contained, in part, in paragraphs 121, 123 and 125.

Although Count VI also names the remaining police officers, plaintiffs do not allege that officers Kenyon, Churchran, Cardinal, Gowsoski or Sergeant Stein were responsible for any of the building defects or had the power to institute change in any way. Nor do plaintiffs attempt to provide support for such a position in any of their pleadings. Accordingly, Count VI is only applicable to Reisterer, Asman, Peters, Hill, the City and Police Department.

the deceased's suicide in violation of 42 U.S.C. § 1985. Specifically, plaintiffs allege the defendants' did not allow inspection of the facilities or the release of information sought by plaintiffs in order to determine whether and to what extent the deceased's constitutional rights had been violated. (Am. Compl., ¶¶ 127-128).

II.

POLICE OFFICERS' MOTION TO DISMISS

All eight police officers move for dismissal of the section 1983 claims pursuant to F.R. Civ. P. 12(b)(6). They contend that the complaint fails to allege the violation of any clearly established statutory or constitutional law, and that they are thus entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

To the extent plaintiffs have failed to state a section 1983 claim, defendants' qualified immunity defense is moot. *Martinez* v. *California*, 444 U.S. 227 (1980); *Carlson* v. *Conklin*, 813 F.2d 769, 770-771 (6th Cir. 1987). Accordingly, the Court will first determine whether plaintiffs have stated a sufficient claim against each of the defendants.

The Sixth Circuit recently restated the applicable standard in ruling on a motion to dismiss:

> A motion under Rule 12(b)(6) tests whether a claim has been adequately stated in the complaint. The basic requirements for a pleading are set out in Rule 8(a) and call for "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." In considering a Rule 12(b)(6) motion, the court must accept as true all factual allegations in the complaint. *Windsor* v. *The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). The court must

> deny the motion to dismiss unless it can be established beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.*; *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

Nishiyama v. *Dickson County*, No. 83-5683, slip op. at 2 (6th Cir. March 18, 1987).

For purposes of this motion, the facts alleged by plaintiffs and which must be accepted as true, are that on November 9, 1982, Danese was arrested at approximately 2:50 a.m. by officers Churchran and Gowsoski for driving while under the influence of alcohol. Upon arrival at the Roseville jail, Danese cried intermittently and repeatedly made comments to Churchran, Gowsoski and Cardinal, the officer who administered the breathalizer test, that he wished he were dead. He also discussed ways he should or could commit suicide and that he would, in fact, commit suicide. Danese further advised the officers that he was on medication for pain and that his physical condition rendered his detainment painful and uncomfortable. Danese's pain medication was taken from him by the officers.

The breathalizer tests given to Danese resulted in scores of .13% and established that Danese was legally drunk. He was then placed in a holding cell, fully clothed, and out of direct view of the supervising officer. The jail did not have a detoxification cell and the television monitor had been inoperable long before November 9.

At approximately 5:15 a.m., Danese advised Officer Cardinal that he was going to hang himself. Officer Cardinal told his supervisor, Sgt. Hill, of his threat. Sgt. Hill, shortly thereafter, left the station without advising the only remaining supervisor, Sgt. Stein, of the threatened suicide.

Sometime between 5:35 a.m. and 5:56 a.m. Danese hanged himself with his shirt from the cross bars of his cell. Upon finding him, Cardinal, Kenyon and Stein cut Danese down and called the Fire Department. The Fire Department's rescue truck arrived at 5:59 a.m., and the Fire Department ambulance arrived at 6:02 a.m. No C.P.R. or other life saving technique was attempted by either the Police or Fire Department personnel. Danese was pronounced dead at 7:08 a.m. His blood contained 0.14% by weight of ethyl alcohol.

In order to sustain a claim under section 1983, the plaintiffs need only allege that the conduct complained of was committed while defendants were acting under color of state law and that the defendants conduct deprived Danese of his constitutional rights. *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981). Since none of the officers contest that they were acting under color of state law, the only issue before the Court is whether plaintiffs have sufficiently alleged a deprivation of Danese's rights secured by the Constitution.

A. Cardinal, Churchran, Gowsoski, Kenyon, Hill and Stein

Plaintiffs allege that the deliberate indifference of officers Cardinal, Churchran, Gowsoski, Kenyon, Hill and Stein to Danese's serious medical needs constitutes a violation of the eighth and fourteenth amendments.

In *Estelle* v. *Gamble*, 429 U.S. 97 (1976), the Supreme Court held that only "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and unwanton infliction of pain' . . . proscribed by the Eighth Amendment." *Id.* at 104. A complaint alleging only negligence in diagnosing or treating a medical condition is insufficient to state a valid claim under the eighth amendment. "In order to state a cognizable claim,

a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106.

The eighth amendment's protection against cruel and unusual punishment, however, applies only to prisoners incarcerated after a criminal conviction. *Whitley* v. *Albers*, ___ U.S. ___, 54 U.S.L.W. 4236 (1986); *Ingraham* v. *Wright*, 430 U.S. 651, 664-668 (1977); *Galas* v. *McKee*, 801 F.2d 200, 205 (6th Cir. 1986). Since Danese was not convicted of a crime, the eighth amendment is not directly applicable.

Under the due process clause of the fourteenth amendment, however, a detainee has a right to be free from punishment altogether. In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Supreme Court held that a detainee's liberty interest under the due process clause proscribes conditions or restrictions during pretrial detention which amount to punishment. "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535. The Court held that absent proof of an intent to punish, whether a challenged condition, practice or policy rises to the level of punishment "generally will turn on 'whether an alternative purpose to which the [restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Id.*

Despite the simplicity of the test in *Wolfish*, the lower courts have found its application awkward when the conduct challenged involves medical treatment of a detainee. *See, e.g., Hamm* v. *DeKalb County*, 774 F.2d 1567, 1572-1574 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 54 U.S.L.W. 3647 (1986). ("Application of the *Bell* v. *Wolfish* standard to [basic conditions such as food, living

space and medical care] is exceedingly difficult and does not provide clear results." *Id.* at 1573.) This has proved especially true in a case such as this where a detainee commits suicide and the administrator of the deceased's estate brings a section 1983 action alleging that the suicide was a result of improper medical care, a lack of proper training and unsafe conditions.

Because of the inflexible nature of the *Wolfish* standard, several circuits, including our own, have analogized the eighth amendment rights of prisoners to those of detainees under the fourteenth amendment, and have applied the deliberate indifference standard in *Estelle* in assessing a pretrial detainee's allegations of inadequate medical care.

In *Roberts* v. *City of Troy*, 773 F.2d 720 (6th Cir. 1985) (*en banc*), the defendant was arrested for fraudulent use of a credit card and was booked at the Troy police station. Later that evening he was found hanging in his jail cell. *Id.* at 722. At trial, the plaintiff, the personal representative of the deceased's estate, did not argue under the *Wolfish* test that in failing to have in place proper procedures to reduce the likelihood of Robert's accomplishing the suicide, defendants intended to punish him. Rather, the plaintiff claimed that Robert's eighth amendment rights were violated by the defendants' deliberate indifference to his medical needs. *Id.* at 723.

Acknowledging that the eighth amendment was not directly applicable to the deceased, the court agreed that the protections of the eighth amendment were indirectly applicable under the fourteenth amendment:

> Roberts, as a pretrial detainee rather than a convicted prisoner, was not within the protection of the eighth amendment; however, the eighth amendment rights of prisoners are analogized to

> those of detainees under the fourteenth amendment, to avoid the anomaly of extending greater constitutional protection to a convict than to one awaiting trial. *See Norris* v. *Frame*, 585 F.2d 1183, 1187 (3d Cir. 1978).[4] [sic, 5]

Id.

At issue on appeal was what standard under the eighth amendment should be applied: negligence or deliberate indifference. The plaintiff contended that the negligence standard applied in a case involving a prison assault was the correct test. The court held that the standard in the Sixth Circuit in prison assault cases was not mere negligence but gross negligence or deliberate indifference. *Id.* at 724. More importantly, however, the court went on to state that a suicide in custody is more closely analogous

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[4] The court recognized earlier in its opinion that in *Wolfish* the Supreme Court had explicitly indicated that a pretrial detainee, who had not been convicted of a crime, retained at least those rights enjoyed by a convicted criminal. *Bell* v. *Wolfish*, 441 U.S. at 545.

The Supreme Court recently stated that "the due process rights of [a pretrial detainee] are at least as great as the Eighth Amendment protection available to a convicted prisoner." *City of Revere* v. *Mass. Gen'l Hosp.*, 463 U.S. 239, 244 (1983).

A person, such as Danese, who was detained overnight for driving while under the influence of alcohol must also possess due process rights at least as great as a convicted criminal. Defendants present no basis for distinguishing between a pretrial detainee and an arrestee for purposes of determining the degree of protection afforded each under the due process clause.

[5] The analogy between the failure to provide medical relief to a detainee suffering from a physical ill and the failure to take steps to save a suicidal detainee from injurying himself is slightly strained since in the latter situation the harm is self-inflicted. *See, e.g., Partridge* v. *Two Unknown Police Officers*, 791 F.2d 1182, 1187 n. 20 (5th Cir. 1986); *Guglielmoni* v. *Alexander*, 583 F. Supp. 821, 827 (D. Conn. 1984); *Matje* v. *Leis*, 571 F. Supp. 918, 930 (S.D. Ohio 1983). The Court need not address this issue, however, since defendants fail to raise it in their motion.

to the failure to provide medical care and that the deliberate indifference standard was, therefore, the correct standard.

> Moreover, the prison assault situation is not as analogous to suicide in custody as is the failure to provide medical care. Indeed, the suicidally inclined prisoner is in need of medical care. In *Wright* v. *Wagner*, 641 F.2d 239, 242 (5th Cir. 1981), a suicide case, the court, citing *Gamble*, used the deliberate indifference standard.

Id.

In an attempt to reconcile its failure to apply the *Wolfish* test and its endorsement of the indirect application of the eighth amendment to a detainee under the fourteenth amendment, the court concluded that the deliberate indifference standard is consistent with *Bell* v. *Wolfish*. "Although *Bell* v. *Wolfish* . . . deals with action rather than the failure to act, if we transpose the *Bell* v. *Wolfish* standard to failures to act, we would also arrive at a deliberate indifference requirement." *Id.* at 725. *Cf. Hamm* v. *DeKalb Cty.*, 774 F.2d 1567, 1572-1574 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 54 U.S.L.W. 3647 (1986).

In another *en banc* decision, the Fifth Circuit, in *Partridge* v. *Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986) (*en banc*), also a jail suicide case, reached a result similar to that reached by the Sixth Circuit in *Roberts*. After holding that *Estelle* was inapplicable because the deceased was a pretrial detainee, the court recognized that the rights of a pretrial detainee under the fourteenth amendment are greater than the rights of a convicted prisoner under the eighth amendment.

Without further explanation the court then stated that under the *Bell* v. *Wolfish* standard, "the defendants had a duty, at a minimum, not to be deliberately indifferent to Partridge's serious medical needs." *Id.* at 1187. Thus, although rejecting the direct application of the eighth amendment and *Estelle*, the court applied the deliberate indifference standard in *Estelle* indirectly through the fourteenth amendment.

Also like the court in *Roberts*, the *Partridge* court could detect no difference between a medical need for psychological or psychiatric treatment and the need for medical aid for physical ills.

> A psychological or psychiatric condition can be as serious as any physical pathology or injury, especially when it results in suicidal tendencies. And just as a failure to act to save a detainee from suffering from gangrene might violate the duty to provide reasonable medical care absent an intervening legitimate government objective, failure to take any steps to save a suicidal detainee from injuring himself may also constitute a due process violation under *Bell* v. *Wolfish*.

Id. at 1187 (citations omitted).

In short, whether as an indirect application of the eighth amendment[6] or as a product of the test under *Bell* v. *Wolfish*, in accordance with the teaching of *Roberts* the due process clause requires that certain steps be

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[6] The Fourth, Seventh and Eleventh Circuits have also concluded that the eighth amendment's ban against cruel and unusual punishment is applicable to a pretrial detainee, although not necessarily with respect to a jail suicide. *Whisenaut* v. *Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Matzker* v. *Herr*, 748 F.2d 1142, 1146 (7th Cir. 1984); *Hamm* v. *DeKalb County*, 774 F.2d 1567 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 54 U.S.L.W. 3647 (1986).

taken to protect a detainee who is suspected to be suicidally inclined. Under *Roberts*, in order to sufficiently allege a claim under the fourteenth amendment, a plaintiff must allege facts which indicate that there was deliberate indifference toward the detainee's serious need to be protected from committing suicide.

The deliberate indifference standard in *Roberts* is consistent with recent Supreme Court and Sixth Circuit decisions that consider the level of conduct necessary to constitute a violation of the due process clause. In *Daniels* v. *Williams*, ___ U.S. ___, 54 U.S.L.W. 4090 (1986), an inmate of a city jail was injured when he slipped on a pillow left on a stairway by a sheriff's deputy. The Supreme Court held that the mere lack of due care on the part of a state official does not "deprive" an individual of life, liberty or property under the due process clause of the fourteenth amendment, for the touchstone of due process is protection of the individual against arbitrary action of government. The Court specifically reserved the question whether "something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protection of the Due Process Clause." *Daniels*, ___ U.S. at ___, 54 U.S.L.W. at 4092 n. 3.[7]

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[7] This question also went unanswered in *Davidson* v. *Cannon*, ___ U.S. ___, 54 U.S.L.W. 4095 (1986). There, an inmate attacked and injured the plaintiff, another inmate. The plaintiff had attempted to alert the Assistant Superintendent of the prison about a threatened attack, through a written note. The note was passed on to a sergeant who failed to notify others of the note and forgot about it when he went off duty. The plaintiff claimed only that the defendants' "negligence failed to protect him from another inmate." *Davidson* v. *Cannon*, ___ U.S. at ___, 54 U.S.L.W. at 4095-4096. The court found *Daniels* controlling: "As we held in *Daniels*, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." *Davidson* v. *Cannon*, ___ U.S. at ___, 54 U.S.L.W. at 4096.

In *Nishiyama* v. *Dickson County*, No. 83-5683, slip op. at 8-10 (6th Cir. March 18, 1987) (*en banc*), the Sixth Circuit held that gross negligence is sufficient to constitute a "deprivation" of due process. There, Kathy Nishiyama was driving her car in Montgomery County, Tennessee, when she was signaled by a Dickson County Sheriff's Department patrol car to pull over to the side of the road. When she pulled her car over, Charles Hartman, the patrol car's sole occupant, approached her and beat her to death. *Id.* at 3.

Hartman, a convicted felon and inmate in the custody of the Dickson County Sheriff's Department, had been placed on "trusty" status following his transfer from state custody to the Dickson County Jail. Hartman was operating the patrol car with the permission and authorization of a sheriff and deputy sheriff of the department. Just preceeding the murder, he had dropped off the sheriff and deputy sheriff at home and was told to return to the jail. *Id.*

Plaintiffs, Nishiyama's parents, brought suit under section 1983 against Dickson County, the sheriff and deputy sheriff, alleging a substantive due process claim under the fourteenth amendment. Initially, the court determined that the practice of providing Hartman with a marked and fully equipped patrol car was action taken under color of state law which deprived Kathy Nishiyama of a constitutionally protected interest in life. *Id.* at 4-8. The court then turned to the question of whether the Nishiyamas' allegation that the defendants acted with gross negligence was sufficient to trigger the protection of the due process clause.

The court first recognized that both the Supreme Court in *Daniels*, and the Sixth Circuit itself in *Wilson* v. *Beebe*, 770 F.2d 578, 586 (6th Cir. 1985), and *Janan* v. *Trammell*, 785 F.2d 557, 559 (6th Cir. 1986), left unde-

cided "the question of whether something less than an intentional act but more than simple negligence might invoke due process protection." *Nishiyama* v. *Dickson County*, No. 83-5683 slip op. at 9. The court then concluded that the allegation of gross negligence in the complaint was sufficient to charge defendants with the "arbitrary use of government power," and thus stated an adequate substantive due process claim.

In embracing gross negligence as conduct sufficient to trigger the guarantees of the fourteenth amendment, the court stated:

> We acknowledge that the term "gross negligence" evades easy definition. In our view, a person may be said to act in such a way as to trigger a section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow.

Id.

The gross negligence standard in *Nishiyama* appears to be similar to the deliberate indifference standard endorsed by the *Roberts* court. Indeed, in *Roberts*, the court explicitly treated the two standards interchangeably. *Roberts* v. *City of Troy*, 773 F.2d at 722. *See Matje* v. *Lies*, 571 F. Supp. 918 (S.D. Ohio 1985) ("deliberate indifference exists when action is not taken in the face of a strong likelihood, rather than a mere possibility that failure to provide care would result in harm to the prisoner," *id.* at 930 (quoting *State Bank of St. Charles* v. *Camic*, 712 F.2d 1140, 1146 (7th Cir. 1983)).

Viewing the facts alleged by plaintiffs to be true, the complaint fails to state a claim to the extent that it al-

leges that the officers failed to provide proper medical attention to Danese while he was booked and after he hanged himself. The officers failure to provide medical aid in either situation does not rise to the level of deliberate indifference or gross negligence, but at worst constitutes mere negligence.

Plaintiffs' claim that the officers failed to protect Danese from self-injury, on the other hand, is sufficient to state a claim under either standard. Not only did Danese tell the officers that he was considering committing suicide, he also provided the officers with a sufficient basis for believing he would carry out his threat. He advised the officers that he was in pain from a previous injury; he indicated he was concerned about outstanding medical bills and violating his probation; and he cried intermittently and was legally drunk.

Despite these obvious signs, the defendants failed to take any precautionary measures to ensure that Danese could not harm himself. Danese was fully clothed when placed in the middle cell. No extra precaution was taken to monitor Danese's behavior. At the time Danese hung himself, Sgt. Hill, the supervising officer on duty, had left the jail to take his car home.

These facts as alleged are adequate to state a claim of gross negligence. The failure to take any action to protect Danese was unreasonable and disregarded the known risk that Danese was seriously contemplating suicide. The officers must have been aware that there was a strong possibility that Danese would hang himself. Likewise, the facts alleged by plaintiffs are sufficient to sustain a claim of deliberate indifference to Danese's medical needs. There was a strong likelihood, rather than just a mere possibility that Danese would hang himself under the facts contained in plaintiffs' complaint.

It cannot be said that plaintiff can prove no set of facts in support of his claim under either standard which would entitle him to relief. *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984); *Madden* v. *City of Meriden*, 602 F. Supp. 1160, 1163-1164 (D.Conn. 1985), (allegations that prisoner was confined without adequate surveillance and without the removal of implements enabling him to take his own life are sufficient to establish eighth amendment violation where prisoner's suicidal tendencies known); *Guglielmoni* v. *Alexander*, 583 F. Supp. 827-828 (D. Conn. 1984) (summary judgment denied in section 1983 case where record permitted inference that prison officials had notice of prisoner's suicidal tendencies and did not take reasonable steps to provide treatment or prevent suicide); *Matje* v. *Leis*, 571 F. Supp. 918, 930-931 (S.D. Ohio 1983) (where inmate known to have substantial medical training threatened suicide by feasible mode, personnel cannot disregard the threats and must treat the inmate as potential suicide.)[8]

The result reached by the Court does not conflict with the Supreme Court's admonition that the federal courts should adopt a hands-off attitude toward the execution of policies and practices of prison administration. *Bell* v. *Wolfish*, 441 U.S. at 547-48. *Accord Espinoza* v. *Wilson*, No. 86-5098, slip op. at 7 (6th Cir. March 27, 1987). For as the Supreme Court has also recognized, "a policy of judicial restraint cannot encompass any failure to take

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[8] Defendants rely heavily on the recent opinion in *Williams* v. *City of Lancaster*, 639 F. Supp 377 (E.D. Penn. 1986), in support of the contention that plaintiff has failed to state a substantive due process claim. The facts in *Williams* are strikingly similar to those in this case. Despite the strong similarities, however, *Williams* is clearly distinguishable because, unlike this case, the prison officials in *Williams* had no reason to suspect that the prisoner might commit suicide. *See also Guglielmoni* v. *Alexander*, 583 F. Supp. at 828 (distinguishing *State Bank of St. Charles* v. *Camic*, 712 F.2d at 114, on similar grounds).

cognizance of valid constitutional claims whether arising in a federal or state institution." *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974). Additionally, the policy of deference to state officials is less substantial when matters of prison discipline and security are not at issue. *Todaro* v. *Ward*, 565 F.2d 48, 53-54 (2d Cir. 1977).

Plaintiffs' allegations that the officers failed to protect Danese from self-injury also states a claim under a second aspect of the "liberty" interest protected by the fourteenth amendment. The liberty interest protected by the substantive aspect of the due process clause includes not only the right to be free from punishment, but also the right to be free from unjustified intrusions on personal security. *Daniels* v. *Williams*, ___ U.S. at ___, 54 U.S.L.W. at 4093, n. 7 (Stevens, J., Concurring); *Youngberg* v. *Rommero*, 457 U.S. 307, 315-316 (1982).

The right to personal security is not extinguished by lawful confinement, *Hutto* v. *Finney*, 437 U.S. 678 (1978), and includes a prisoner's right to safe conditions. *Davidson* v. *Cannon*, ___ U.S. at ___, 54 U.S.L.W. at 4097 (Blackmum, J. dissenting); *Youngberg* v. *Romero*, 457 U.S. 307 at 315. In *Youngberg*, the Court held that if professionally acceptable judgment concerning the conditions of confinement is exercised, the infringement of an institutionalized mental patient's liberty interest in safe conditions does not violate the due process clause.

The interest in safe conditions clearly applies to the physical conditions of the jail itself over which officers Cardinal, Churchran, Gowsoski, Kenyon and Stein admittedly have no control. The interest in safe conditions also extends, however, to the need for the implementation of precautionary measures in protecting suicidally inclined detainees. The unsafe condition of Danese's confinement did not exist solely because he was not placed in a detoxification cell, because there was a hori-

zontal bar in the cell which was previously used for a suicidal hanging or because the monitor was malfunctioning. The unsafe conditions were also the product of defendants' inaction in protecting Danese despite their awareness of Danese's threats and mental and physical condition.

Having already determined that the defendants' actions constitute deliberate indifference and gross negligence, the defenedants' conduct certainly cannot be construed as professionally acceptable judgment. *See, e.g., Valentine* v. *Strange*, 5597 F. Supp. 1316 (E.D. Virginia 1984). Accordingly, plaintiffs' complaint also adequately states a claim under the personal security analysis in *Youngberg*.[9]

B. Asman, Peters and Hill[10]

1. Inadequate training and procedures claim

Plaintiffs do not contend that Asman, Peters, and Hill

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[9] Plaintiffs also could have alleged a claim under the procedural aspect of the due process claim. Danese certainly had an interest under the due process clause in preserving his life. *Nishiyama* v. *Dickson Cty.*, No. 83-5683, slip op. at 4. Additionally, the holding in *Parrott* v. *Taylor*, 451 U.S. 527 (1981), is not applicable because plaintiffs' claim is not based on a "random and unauthorized act," but rather on an "established state procedure" followed by defendants. *Pantoja* v. *City of Gonzales*, 538 F. Supp 335, 337 (n.D. Cal. 1982).

Plaintiffs do not challenge the "fundamental fairness of the State's procedures," however, and the complaint, therefore, fails to state a valid due process objection. *Daniels* v. *Williams*, ___ U.S. at ___, 54 U.S.L.W. at 4093 (Stevens, J., concurring).

[10] Plaintiffs' complaint includes Mayor Riesterer in the inadequate training and procedures, false imprisonment and defective building claims discussed in this section. Mayor Riesterer did not, however, join in the motion to dismiss filed by the officers.

The extent to which Riesterer, Asman, Peters and Hill possess the authority and responsibility to train the officers, establish station procedures and maintain or recommend changes in the physical conditions of the jail has not been raised by defendants. At trial, however, plaintiffs will, of course, be expected to establish that each official was charged with the responsibility and authority over each of these matters.

directly violated Danese's constitutional rights. Rather, they claim that the defendants in their supervisory capacities "implicitly authorized and/or knowingly acquiesced" in the officers unconstitutional conduct by failing to properly train the City's police officers and establish adequate procedures affecting the holding, processing, medical treatment and security of all persons taken into custody. (Am. Compl., ¶¶ 51, 125).

In *Rizzo* v. *Goode*, 423 U.S. 362 (1976), the Supreme Court held that a supervisory official's failure to control his individual subordinates is not actionable absent a showing that there is a direct casual link between the acts of individual officers and the supervisory defendants. *Id.* at 370-371.

Relying on *Rizzo*, the Sixth Circuit in *Hays* v. *Jefferson County*, 668 F.2d 869 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982), set forth the following standard in determining the liability of supervisory personnel:

> Where . . . the constitutional violation was not alleged to be part of a pattern of past misconduct, a supervisory official or a municipality may be held liable only where there is essentially a complete failure to train the police force, or the police force, or training that is so reckless or grossly negligent that future police conduct is almost inevitable . . . or would properly be characterized as substantially certain to result, *Rheuark* v. *Shaw*, 477 F. Supp. 897 (N.D. Texas 1979).

Id. at 874 (internal citations omitted).

The *Hays* court also stated: "At a minimum a plaintiff must show that the official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Id.*

In addition to demonstrating a failure to train, there must also exist a casual relationship between the failure to train and the conduct of the police officers. *Rizzo* v. *Goode*, 423 U.S. at 370-371; *Rymer* v. *Davis*, 754 F.2d 198, 201 (6th Cir.), *vacated sub nom. City of Shepherdsville* v. *Rymer*, ___ U.S., ___, 53 U.S.L.W. 2836 (1985), *reaff'd*, 775 F.2d 756 (6th Cir. 1985), *cert. denied*, ___ U.S. ___, 55 U.S.L.W. 3607 (1987).

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Nevertheless, plaintiffs have failed to allege any facts in support of the contention that inadequate police training existed and was the proximate cause of the unconstitutional treatment of Danese. *Smith* v. *Yono*, 613 F. Supp. 50, 56 (E.D. Mich. 1985). Accordingly, this claim is DISMISSED WITHOUT PREJUDICE. Plaintiffs have ten days upon receipt of this order to amend their complaint to include facts in support of their claim.

2. False imprisonment and defective building claim

Unlike the inadequate training and procedures claim, plaintiffs allege that Asman, Peters and Hill directly violated Danese's liberty interest under the fourteenth amendment by falsely imprisoning him in a building they knew was defective.

Plaintiffs' false imprisonment claim fails to state a claim under the fourteenth amendment. Plaintiffs' complaint acknowledges that Danese was legally drunk when he was arrested; plaintiffs do not contend that Danese was improperly arrested. The complaint only alleges that Danese was held against his will and that his imprisonment was accomplished "by actual physical force or by an express or implied threat."

It is questionable whether these allegations are even sufficient to withstand a tort law analysis. In any event, it is clear that defendants' conduct did not deprive Danese of his liberty without due process. *Baker* v. *McCollan*, 443 U.S. 137 (1979). Additionally, the claim also fails under *Daniels* and *Nishiyama*.

A more difficult question, however, is whether the building defects alleged by plaintiffs state a claim under the fourteenth amendment. Specifically, the complaint alleges that defendants were grossly negligent in that they failed to: (1) construct and/or revise the jail to provide functioning visual and audio monitoring of prisoners; (2) remove the top bars from cells; and (3) provide at least one detoxification cell for the detention of chemically impaired persons. (Am. Compl., ¶¶ 97, 98; 106, 107; 123-124).

Viewing these facts as true, the Court finds that plaintiffs have stated a valid fourteenth amendment claim under both the "punishment" and "personal security" liberty analyses.[11]

In order to state a claim under the punishment analysis, *Roberts*, coupled with *Nishiyama*, require that plaintiffs allege facts which indicate that defendants were deliberately indifferent towards, or grossly negligent in attending to, Danese's need to be protected from committing suicide. In order to state a claim under the personal security analysis in *Youngberg*, plaintiffs need only set forth facts which show that the physical condition of the jail are not acceptable to an expert applying professionally acceptable judgment.

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[11] The fact that the three defects alleged by plaintiffs may also constitute violations of the Michigan Administrative Code is irrelevant under the liberty analysis employed here. Although such violations might give rise to a liberty interest in the context of a procedural due process analysis, as stated in footnote 9, plaintiffs fail to raise a procedural due process claim.

The lack of a detoxification cell, horizontal bars in a cell, and the failure to provide appropriate visual or audio monitoring of prisoners constitutes both gross negligence and deliberate indifference to the protective needs of chemically impaired detainees such as Danese. These conditions not only demonstrate a total lack of concern for the needs of a detainee known to be suicidally minded — taken as a whole they virtually invite such prisoners to carry out their self-demise. Similarly, such conditions may not meet the minimum standards according to an expert exercising profesionally acceptable judgment.

The Michigan Administrative Code Rules cited in the complaint requiring lockups, such as the Roseville Jail, to contain a detoxification cell and monitoring system lend support to the contention that the conditions at the jail do not comport with professionally acceptable judgment. *See Soto* v. *City of Sacramento*, 567 F. Supp. 662, 681-683 (E.D. Cal. 1983). Succinctly, plaintiffs have sufficiently alleged a deprivation of Danese's liberty interest under the due process clause of the fourteenth amendment.

C. Qualified Immunity

The following claims remain:

(3) *Cardinal, Churchran, Gowsoski, Kenyon, Hill and Stein:* Violation of substantive due process under punishment/personal security analyses based upon the failure to protect Danese from hanging himself.

(2) *Asman, Peters and Hill:* Violation of substantive due process under punishment/personal security analyses based upon building conditions.

The objective standard for evaluating claims of qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), is now clearly established:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

In discussing *Harlow*, the Sixth Circuit concluded that:

> The trial judge is to apply this purely objective test as a matter of law before discovery occurs. If the law which the defendant is alleged to have violated is clearly established, then the qualified immunity defense should fail and discovery should proceed. If the law is not clearly established, the defendant is immune.

Windsor v. *The Tennessean*, 719 F.2d 155, 165 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). *Accord Arrington* v. *McDonald*, 808 F.2d 466, 467-468 (6th Cir. 1986); *Donta* v. *Hooper*, 774 F.2d 716, 719 (6th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3362 (March 14, 1986) (No. 85-1519).

Police officers perform discretionary functions and are entitled to qualified or "good faith" immunity from suit for damages arising out of their official acts. *Malley* v. *Briggs*, ___ U.S. ___, 54 U.S.L.W. 4243 (1986); *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967).

Plaintiffs rely on *Ross* v. *Consumers Power*, 420 Mich. 567, 363 N.W.2d (1984), and other Michigan cases for the proposition that the defendants' violation of several pro-

visions of both the Roseville Police Department Rules and Michigan Administration Code constitute breach of their ministerial duties. These ministerial duties, plaintiffs contend, are established by the Department Rules and Administrative Code. Because the grant of qualified immunity under *Harlow* extends only to officials in the performance of discretionary as opposed to ministerial functions, plaintiffs claim that *Harlow* is inapplicable.

Initially, plaintiffs' reliance on principles of immunity under Michigan state tort law is inappropriate. In *Martinez* v. *California*, 444 U.S. 277 (1980), the Supreme Court explicitly noted that conduct that is wrongful under section 1983 cannot be immunized by state law. *Id.* at 284, and n.8 *See also McClary* v. *O'Hara*, 786 F.2d 83, 85 (2d Cir. 1986). The principles of *Ross* and its progeny are therefore irrelevant.

Turning to federal law, plaintiffs' argument fails under the reasoning in *Davis* v. *Scherer*, 468 U.S. 183 (1984). In *Davis*, the Supreme Court held that "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Id.* at 194. The Court indicated that breach of a duty created by state regulations does not cause a forfeiture of qualified immunity unless the breach itself gives rise to an action for damages under some provision of the Constitution. This is true, the Court maintained, regardless of whether the regulations create discretionary or ministerial duties. *Id.* at 196 and n. 14.

Here, plaintiffs do allege that defendants' breach of the duties set forth in the Department Rules and Administrative Code entitles them to damages. These claims pertain to their tort law remedies, however, and not to their constitutional claims.

Had plaintiffs alleged a procedural due process claim, for example, contending that Danese was, without due process, deprived of a liberty interest created by the Department Rules or Administrative Code, violation of any of these regulations would be an integral part of the constitutional claim. Plaintiffs have not alleged a procedural due process claim, however, and their constitutional claims do not, under any other rationale, encompass the alleged violatins of the Department Rules and Administrative Code. Therefore, whether the Department Rules or Administrative Code establish duties "ministerial" in nature is irrelevant, and the qualified immunity defense under *Harlow* is available to the officers.

The only question which the Court must decide, then, is whether Danese's liberty interests in personal security and freedom from punishment under the due process clause of the fourteenth amendment were clearly established on November 9, 1982, the date Danese hanged himself.

1. Cardinal, Churchran, Gowsoski, Kenyon, Hill and Stein —

Although *Roberts* and *Partridge* were decided after Danese's death, the standard of *Estelle* was clearly established before the time in question. *Guglielmoni* v. *Alexander*, 583 F. Supp. at 829. Additionally, the court in *Roberts* held that the deliberate indifference standard is merely a derivative of the test in *Bell* vs. *Wolfish*, also decided before the incident in question. *Roberts* v. *City of Troy*, 773 F.2d at 725.

Similarly, the fourteenth amendment liberty interest in freedom from unjustified intrusion upon physical security can be traced back to *Ingraham* v. *Wright*, 430 U.S. 651 (1977). Additionally, it was directly applied to

"conditions of confinement" in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), decided nearly five months before the incident in question. Both liberty interests, therefore, were clearly established as of November 9, 1982; the shield of *Harlow* cannot be extended to protect officers Cardinal, Churchran, Gowsoski, Kenyon or Sergeants Hill or Stein from liability.

2. Asman, Peters and Hill

Having dismissed plaintiffs' inadequate training and procedures claim with leave to amend, determination of whether *Harlow* immunity is appropriate must be postponed until plaintiffs amend their complaint. The liberty interests implicated by the defective building claims are identical to those implicated in the claim against the officers on duty. The analysis of the applicability of *Harlow* immunity to those officers is equally applicable here.

III.

POLICE AND CITY OF ROSEVILLE, ROSEVILLE FIRE DEPARTMENT AND MAYOR RIESTERER'S MOTION FOR PARTIAL SUMMARY JUDGMENT OR DISMISSAL

Defendants raise eight issues in their motion. The first three issues involve plaintiffs' state law claims and need not be considered since the Court has refused to exercise pendant jurisdiction over these claims. (Memorandum Opinion and Order, April 1, 1987). The sixth issue concerns plaintiffs' eighth amendment claim, and the eighth issue seeks dismissal of Fire Chief Ireland because he is an improper party. Both issues are moot, the former as a result of the analysis contained in the Court's response in this opinion to the police officers' motion, the latter because Ireland was dismissed by stipulation of the parties.

The following three issues remain:

(1) Whether the City of Roseville and its Police and Fire Departments can be held "vicariously" liable for any violation of the decedent's civil rights;

(2) Whether plaintiffs' civil rights claims are defective on their face and whether the City, Police and Fire Departments are directly liable for any violations of 42 U.S.C. §§ 1983 and 1985; and

(3) Whether plaintiffs are entitled to equitable relief.

These remaining issues do not involve Mayor Riesterer, and refer only to the City, Police and Fire Departments.

Defendants' motion is characterized as one for partial summary judgment or dismissal. Defendants' supporting brief does not clearly delineate which issues are to be treated under which standard. Because of this lack of clarity and the reference to matters outside the complaint, defendants' motion will be treated as one for summary judgment. F.R. Civ. P. 12(b); *Mozert* v. *Hawkins City Public Schools*, 765 F.2d 75, 78 (6th Cir. 1985).

Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Willets* v. *Ford Motor Co.*, 583 F.2d 852, 855 (6th Cir. 1978); *Ghandi* v. *Police Dept. of City of Detroit*, 747 F.2d 338, 345 (6th Cir. 1984); F.R. Civ. Pro. 56.

In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as, all pleadings, depositions, answers to interrogatories, and admissions properly on file in the

light most favorable to the party opposing the motion. *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *United States* v. *Diebold*, 368 U.S. 654 (1962); *Smith* v. *Hudson*, 600 F.2d 60 (6th Cir. 1979).

The Court will address the three remaining issues raised in defendants' motion in the context of plaintiffs' sections 1983 and 1985 claims. The request for equitable relief will then be analyzed.

[*A.*] Section 1983

1. City and Police Department

Plaintiffs' eighth amendment claims must be dismissed because Danese had not been convicted of any crime. Defendants need only show that there is no factual dispute that the City and Police Department did not have a custom or policy of inadequate training and deliberate indifference or gross negligence with respect to the physical conditions of the jail, and that the custom or policy did not cause the deprivation of Danese's liberty without due process.

a. Inadequate training

Municipal bodies are not immune from section 1983 actions. *Monell* v. *New York City Dept. of Social Services*, 426 U.S. 658 (1978). Nevertheless, under *Monell*, a local government entity may not be sued under section 1983 for an injury inflicted solely by its employees or agents. "[A] municipality cannot be held liable *solely* because it employs a tort feasor — or, in other words, a municipality cannot be held liable under section 1983 on a *respondeat superior* theory." *Id.* at 691. (Emphasis in original). Municipal liability under section 1983 can be imposed only where the municipal entity itself causes the constitutional violation.

In *Monell*, the Court held that municipal action taken in the form of written policies or at least decisions

adopted and promulgated by a city's lawmakers justifies the imposition of municipal liability under section 1983. "Local governing bodies, therefore, can be sued directly under section 1983 . . . where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690.

The Court further held that a governmental custom, described as a permanent and well settled practice which has not received formal approval through the body's official decision-making channels, if responsible for a deprivation of rights protected by the Constitution, also justifies liability under section 1983. *Id.* at 690-691.

Finally, the Court held that a municipal entity may also be liable for the "edicts or acts" of subordinate officials whose conduct may "fairly be said to represent official policy." *Id.* at 694.

Relying on this language in *Monell*, the Court in *Pembaur* v. *City of Cincinnati*, 475 U.S. ___, 54 U.S.L.W. 4289 (1986), held that a Hamilton County Prosecutor's decision instructing deputy sheriffs attempting to serve capiases at a medical clinic to forcibly enter the clinic, directly caused the violation of the clinic owner's fourth amendment rights. *Id.* at ___, 54 U.S.L.W. at 4292-4293.

In *City of Oklahoma City* v. *Tuttle*, 471 U.S. ___, 53 U.S.L.W. 4634 (1985), a majority of the Court agreed that proof of a single incident of unconstitutional activity by a nonpolicy making municipal employee is insufficient in itself to establish municipal liability under section 1983. At issue in *Tuttle* was the propriety of an instruction to the jury permitting the jury to find that a police department had a custom or policy of inadequate training based on a single incident of police behavior.

Although evidence other than the single incident was offered to prove an official "policy" of inadequate training, the Court found the instructions invalid because they allowed the jury to impose liability on the basis of the single incident alone. *Tuttle* left unanswered the question whether proof of inadequate training through other evidence may constitute a custom or policy and thus support a section 1983 action. The only guidance is found in a footnote in the plurality opinion:

> [E]ven assuming that such a "policy would suffice, it is open to question whether a policy maker's "gross negligence" in establishing police training practices would establish a "policy" that constitutes a "moving force" behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policy maker would be required.

Tuttle, 471 U.S. at ___, 53 U.S.L.W. at 4643 n. 7.

The Supreme Court granted certiorari in *City of Springfield* v. *Kibbe*, 475 U.S. ___, 54 U.S.L.W. 3517 (1986), to resolve the question whether a municipality can be held liable under section 1983 for inadequate training of its employees. In a *per curiam* opinion, the writ was denied as improvidently granted. *City of Springfield* v. *Kibbe*, ___ U.S. ___, 55 U.S.L.W. 4239 (1987).

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Powell dissented. After arguing that the case was properly before the Court, Justice O'Connor concluded that "[I]n my view the 'inadequacy' of police training may serve as the basis for section 1983 liability only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the City's domain." *Id.* at ___, 55 U.S.L.W. at

4242. In support of her conclusion, Justice O'Connor acknowledged that several circuits have phrased the requisite degree of fault necessary to hold a municipality liable for inadequate training as "deliberate indifference" or gross negligence "amounting to deliberate indifference." *Id.*

The Sixth Circuit in *Hays* v. *Jefferson County*, 668 F.2d 869 (6th Cir. 1982), *cert. denied*, 59 U.S. 833 (1983), held that the reckless or gross negligence standard applicable in determining supervisory liability is also the appropriate standard in ruling on the liability of a local governmental entity. *Id.* at 874.

Hays was reaffirmed in *Rymer* v. *Davis*, 754 F.2d 198, 201 (6th Cir.), *vacated sub nom. City of Shepherdsville* v. *Rymer*, ___ U.S. ___, 53 U.S.L.W. 2836 (1985), *reaff'd*, 775 F.2d 756 (6th Cir. 1985), *cert. denied*, ___ U.S. ___, 55 U.S.L.W. 3607 (1987).

> In *Hays*, . . . this Court joined a number of courts that have interpreted *Monell* to hold that a municupal custom that authorizes or condones police misconduct can be inferred when the municipality has failed to train or been grossly negligent in training it [*sic*] police force. . . .
>
> It is not enough, however, that a plaintiff demonstrate a general failure to train. There must exist a casual relationship between the failure to train and the conduct of the police officer.

Id. at 200-201.

Applying these principles to the present case, a material issue of fact exists concerning whether the City and Police Department's failure to train the officers in suicide prevention amounts to gross negligence and

whether the failure to train the officers caused the deprivation of Danese's liberty without due process.

As a result of a suicide at the Roseville Jail on February 18, 1977, the Department of Corrections conducted a visit of the jail on June 15, 1977. Two letters were sent by the Department of Corrections to Chief Asman delineating the jail's shortcomings under the rules of the Michigan Administrative Code. Asman responded to the second letter on August 11, 1977. He indicated, in part, that guidelines for screening prisoners for suicidal tendencies had been placed at the Booking Desk. No mention is made of any actual training. Asman did, however, circulate an inter-office memo to the shift commanders and all other officers which contained a paragraph highlighting some of the signs which might indicate that a prisoner is contemplating suicide.

It is unclear from the record the extent to which any of the officers on duty on November 9, 1982, were exposed to the memo circulated by Asman nearly five years before. Additionally, it is unclear whether the screening guidelines were ever placed at the Booking Desk, and even if they were, whether they remained there for five years. Even if the guidelines did still exist, there is no indication as to whether the officers were even required to read them. Finally, plaintiffs contend that several of the officers have testified during their deposition that they were never trained in suicide prevention techniques.

In short, whether the City and the Police Department were grossly negligent in failing to train the police officers is clearly in dispute since the extent of the officers training has not even been established.[12]

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[12] Unlike the motion to dismiss filed by the officers, the present motion for summary judgment requires this Court to take into consideration the exhibits attached to plaintiffs' motion. Accordingly,

(*continued on following page*)

b. Building defects

Plaintiffs do not contend that the City or Police Department adopted an official policy mandating that no detoxification cell be built, that horizontal bars be left in all the cells and that no effective means of monitoring prisoners be established. They do contend, however, that the continued failure to implement the above alterations constitutes a custom under *Monell.*

Prior to the death of Danese, the Department of Corrections repeatedly warned Chief Asman that the absence of a detoxification cell and electric monitoring violated the Michigan Administrative Code. Similar violations were again found to exist following an inspection after Danese's suicide. Reports of these violations were sent to Asman and are attached to plaintiffs' response.

Although the failure to meet state standards is not directly related to the constitutional violation itself, it is indicative of the attitude and pattern of inaction. The following are a few of the questions of fact which must be reserved for trial.

(1) Did the conditions of the jail violate Danese's constitutional rights?

(2) Were City lawmakers aware of the inadequate jail conditions?

(3) If so, did their failure to act constitute a custom under *Monell?*

(4) Were Chief Asman or Inspector Peters in a

(*continued from previous page*)

the defendants' contention that the complaint fails to provide factual support for the "custom or policy" claim cannot be sustained. The exhibits attached to plaintiffs' response to defendants' motion adequately demonstrate that the extent of defendants' failure to adequately train its officers and thus whether the City and Police Department had a custom or policy of inadequate training is in dispute.

position to affect changes in the conditions of the jail?

(5) If so, did their failure to act constitute a custom under *Monell* and *Pembaur*?

(6) If there was a "custom" of failing to provide constitutionally adequate facilities, did the "custom" cause the constitutional deprivation?

The City and Police Department's motion for summary judgment must, therefore, be DENIED with respect to the section 1983 claims.

2. Fire Department

Each of the individual Fire Department employees have been dismissed by stipulation of the parties. A cause of action may still remain against the Fire Department, however, if this employees' failure to provide proper medical attention deprived Danese of a constitutional right and the Fire Department's failure to train its employees caused the deprivation.

Viewing the complaint in a light most favorable to plaintiffs, the complaint alleges claims under the eighth and fourteenth amendments. (Am. Compl., ¶¶ 111-118, 123). Specifically, the complaint alleges that the Fire Department personnel's gross negligence in their failure to render any C.P.R. or other life saving techniques in the absence of a pronouncement by a licensed physician that Danese was dead proximately caused the death of Danese.

The eighth amendment is inapplicable since Danese had not been convicted. The "punishment" analysis under the fourteenth amendment is also inapplicable because the Fire Department is not connected with the incarceration of persons in violation of the law. Similarly,

the "personal security" analysis is not appropriate because the Fire Department is not responsible for the conditions of the jail.

Any claim against the Fire Department must be for the deprivation of life under the substantive aspect of the due process clause. Under *Nishiyama*, defendants' gross negligence must have deprived Danese of a constitutional right without due process.

Defendants fail to allege any facts whatsoever from which the Court could conclude that the ambulance and rescue truck attendants made any attempt to monitor the life-signs of Danese. Accordingly, there is an issue of fact as to whether defendants were grossly negligent in failing to provide any life-saving techniques upon their arrival.

This does not end the inquiry, however, since absence of an issue of fact as to whether the Fire Department caused the deprivation would still make the granting of summary judgment proper. In accordance with *Hays* and *Rymer*, the Fire Department's training of its ambulance and rescue personnel must be grossly negligent in order to establish liability under section 1983. Plaintiffs have provided more than sufficient evidence to place this issue in dispute.

The staffing of the City ambulance service has caused a great deal of disturbance in the City of Roseville. Firefighters apparently resent having to make ambulance runs, and their union has discouraged them from undergoing proper training. Because the staffing of the ambulance service did not meet state standards, the City Council approved the elimination of the ambulance service and contracted to provide advanced paramedics.

In light of the considerable controversy and several recall drives resulting from this decision, the Mayor and

City Council voted to restore the basic ambulance service to the Fire Department. Plaintiffs contend that the union again refused to negotiate, and the City was again unable to comply with minimum state licensing requirements.

Under these facts, the failure of the City and Fire Department to maintain an ambulance service with properly trained personnel may rise to the level of gross negligence and is a question of fact for trial.

B. Section 1985

Defendants contend that plaintiffs have failed to allege sufficient allegations to support a "civil conspiracy." The Court agrees.

Section 1985 deals with conspiracies to interfere with civil rights. The purpose of the statute is to provide a cause of action for individuals deprived of their federal rights by a conspiracies of either public officials or private persons. C. Antieu, *Federal Civil Rights Acts*, § 260 (2d ed. 1980).

Subsection (1) of section 1985 deals with preventing a United States officer from performing his duty, subsection (2) of section 1985 deals with intimidating a party, witness or juror in a United States court or obstructing justice in any state or territory to deprive a person of equal protection, and subsection (3) of section 1985 deals with depriving a person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws. A complaint brought pursuant to section 1985 must plead facts with specificity; broad conclusory statements unsupported by any factual allegations are not sufficient to support an action under 1985. *Blackburn* v. *Fisk University*, 443 F.2d 121 (6th Cir. 1971). In addition, a claim brought pursuant to 42 U.S.C. 1985(3) must allege (1) the existence of a cons-

piracy, and (2) some class-based discriminatory animus. *Dunn* v. *State of Tennessee*, 697 F.2d 121 (6th Cir. 1982).

Upon review of the complaint and file the Court does not find sufficient factual allegations to support a section 1985 claim. Subsections 1 or 2 of section 1985 do not appear applicable to the instant case. Although a cause of action under section 1985(3) may have been the basis for plaintiffs' claim, they failed to allege any class-based discriminatory animus.

Accordingly, the Court finds that plaintiffs have failed to state a claim under section 1985 and defendants are entitled to summary judgment as a matter of law.

C. Equitable Relief

Plaintiffs request the Court issue an order compelling defendants to comply with Roseville Police Department Rules, Mich. Admin. Code 791.501 *et seq.*, and Mich. Comp. Laws Ann. § 691.1406 (West 1987). Having dismissed the state claims requesting damages for the violation of these provisions, the Court finds it inappropriate to consider a request for injunctive relief based on these same provisions. Accordingly, plaintiffs' request for equitable relief in Count XI is DISMISSED WITHOUT PREJUDICE.

SUMMARY

The police officers' motion to dismiss is GRANTED with respect to the eighth amendment claim against all defendants and the fourteenth amendment claims against Asman, Peters and Hill for inadequate training and for false imprisonment. It is DENIED with respect to fourteenth amendment claims against Cardinal, Churchran, Gowsoski, Kenyon, Hill and Stein for failing to protect Danese from hanging himself, and against Asman, Peters and Hill for the conditions of the jail.

Plaintiffs may, in accordance with this Order, amend their complaint to add adequate factual support for their claim against Asman, Peters and Hill for inadequate training.

The motion for partial summary judgment or dismissal filed by Mayor Reisterer, the City of Roseville and Fire Department, and joined by the Police Department is GRANTED with respect to the section 1985 claims and the request for equitable relief, and DENIED with respect to the section 1983 claims.

IT IS SO ORDERED.

/s/ JAMES HARVEY
United States District Judge

(Proof of Service Omitted)

APPENDIX F

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT XIV, § 1

* * *

. . . nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1983

Every person who under control of any statute, ordinance, regulation, custom, or usage of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

M.C.L.A. 791.262; M.S.A. 28.2322

The department shall supervise and inspect local jails and houses of correction *for the purpose of obtaining facts* in any manner *pertaining* to the usefulness and *proper management* of said penal institution *and of promoting proper, efficient and humane administration* thereof, and *shall promulgate rules and standards with respect thereto;* and any reasonable order

with respect to such penal institution may be enforced through mandamus or injunction in the Circuit Court of the County where the penal institution is located, through proper proceedings instituted by the attorney general on behalf of the commission. . . . (Emphasis added.)

MICHIGAN ADMINISTRATIVE CODE/REGULATION 791.511(1) [*Variances*]

A facility *shall* comply with the requirements of these rules except that the commission may grant a variance. (Emphasis added.)

MICHIGAN ADMINISTRATIVE CODE/REGULATION 791.553(1) [*Monitoring*]

A . . . lockup . . . *shall* have an electronic monitoring system built in so that activities can be checked . . . and so an inmate can advise the officer of emergency needs. (Emphasis added.)

MICHIGAN ADMINISTRATIVE CODE/REGULATION 791.555 [*Detoxification Cells*]

(1) A jail or lockup *shall* provide one or more detoxification cells which shall be designed for detention of chemically impaired persons during the detoxification process only. (Emphasis added.)

* * *

(7) The cell *shall* be located near a guard station in order to insure proper supervision. The cell shall be separate from any inmate living area. (Emphasis added.)

(8) A detoxification cell *shall* be constructed to provide unhampered supervision of the entire detoxification cell area and materially reduce noise. (Emphasis added.)

MICHIGAN ADMINISTRATIVE CODE/REGULATION 791.601(1) [*Administration*]

A facility *shall* remain operational 24 hours a day with *sufficient personnel on duty, . . .* awake and alert *for an emergency* to insure proper security and correctional control. (Emphasis added.)

MICHIGAN ADMINISTRATIVE CODE/REGULATION 791.603 [*Staff Training*]

(1) The Commission *shall* recommend standards for correctional staff orientation and in service training programs. (Emphasis added.)

(2) . . . the administrator should develop and implement a continuing orientation and in service training program for correctional staff in conjunction with the standards recommended by the commission and training sponsored by the Department of Corrections.

MICHIGAN ADMINISTRATIVE CODE/REGULATION 791.634 [*Tools, Equipment and Hazardous Substances*]

* * *

(3) Damaged, non-functioning or *malfunctioning security equipment shall* be promptly *repaired* or replaced. (Emphasis added.)

MICHIGAN ADMINISTRATIVE CODE/REGULATION
791.635 [*Accounting for Inmates*]

* * *

(2) Provision *shall* be made to provide *close visual supervision* for an inmate who is *potentially suicidal,* mentally ill or demonstrates unusual or bizarre behavior. (Emphasis added.)

MICHIGAN ADMINISTRATIVE CODE/REGULATION
791.642 [*Inmate Classification*]

(1) A facility administrator *shall* provide a basic plan for classifying inmates. . . . (Emphasis added.)

MICHIGAN ADMINISTRATIVE CODE/REGULATION
791.657 [*Inmate Health Care*]

(1) The administrator *shall* insure that *appropriate medical screening* and health care is provided to inmates. (Emphasis added.)

No. 89-1049

In The

Supreme Court of the United States

October Term, 1989

JANET M. DANESE, Individually and as Personal Representative of THE ESTATE OF DAVID DANESE, Deceased; LOUIS DANESE, SR., DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE, and LOUIS DANESE, Individually,

Petitioners,

v

THOMAS A. ASMAN, Individually and as Chief of Police of the City of Roseville; ROBERT PETERS, Individually and as Inspector for the City of Roseville; HOWARD HILL and FREDERICK STEIN, Individually and as Sergeants and Shift Commanders for the City of Roseville; STEVEN GOWSOSKI, ROBERT CHUCHRAN, DENNIS CARDINAL and RICHARD KENYON, Individually and as Police Officers of the City of Roseville,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS ASMAN, PETERS, HILL & STEIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

– AND APPENDIX –

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No. 89-1049

In The

Supreme Court of the United States

October Term, 1989

JANET M. DANESE, Individually and as Personal Representative of THE ESTATE OF DAVID DANESE, Deceased; LOUIS DANESE, SR., DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE, and LOUIS DANESE, Individually,

Petitioners,

v.

THOMAS A. ASMAN, Individually and as Chief of Police of the City of Roseville; ROBERT PETERS, Individually and as Inspector for the City of Roseville; HOWARD HILL and FREDERICK STEIN, Individually and as Sergeants and Shift Commanders for the City of Roseville; STEVEN GOWSOSKI, ROBERT CHUCHRAN, DENNIS CARDINAL and RICHARD KENYON, Individually and as Police Officers of the City of Roseville,

Respondents.

RESPONDENTS ASMAN, PETERS, HILL & STEIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS A. ASMAN, ROBERT PETERS, HOWARD HILL AND FREDERICK STEIN, hereby respond to Petitioners' Petition for Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, respectfully requesting this Honorable Court deny same.

STATUTORY PROVISIONS

The statutory provisions involved in this matter are Michigan Statutes MCLA 28.221, MSA 4.451; MCLA 28.609, MSA 4.450(9); MCLA 791.262(5), MSA 28.2322 (5) and Michigan Administrative Code Regulations 791. 501(4), 791.503(4), 791.557(1), 791.603(2) and 791.641 (1)(c). Relevant portions of these are reproduced at Appendix A.

STATEMENT OF THE CASE

I.

THE NEED FOR CORRECTION

The following presentation of facts supplements and corrects the factual statement of the case submitted by the Petitioners.

No singular pleading cogently states the facts of this lawsuit. A Third Amended Complaint is the prevailing pleading. (R: 234) In summary, it avers (incorporating by reference) ¶¶ 1-147 of the First Amended Complaint, ¶¶ 129-147 of the Second Amended Complaint, Count XI of the Second Amended Complaint and then adds ¶¶ 148-161 as new averments.

Petitioners, confronted with repeated motions to dismiss and for summary judgment, chose to offer in

the record facts supplemental to their pleadings to avoid dismissal. (R: 135, 150, 169, 170 and 181) Petitioners offered the District Court Respondents' incident reports, authenticated and attested, in defense of motion for summary judgment. (R: 170, p 530)

Because Petitioners submitted these attested factual matters and because these facts provide a cogent correct statement of the case, Respondents submit Petitioners' offerings to supplement and correct the Statement of the Case. Respondents note the following materials were relied upon by the Petitioners in presenting their Statement of the Case, but were presented in conclusionary style, blurring important factual circumstances which should be considered. (Petitioners' Brief, p 2, fns. 1-2)

II.

THE OCCURRENCE AS CORRECTED

On November 9, 1982, David Danese was arrested in Roseville, Michigan at approximately 2:50 a.m. by Respondents Chuchran and Gowsoski. He was arrested for the offense of driving a motor vehicle while under the influence of alcohol. He was taken to the Roseville Police Station which had holding cells to house pretrial detainees pending arraignment. (R: 170, p 547)

Upon arriving at the Roseville Police Station, Officer Gowsoski processed Mr. Danese. His written report, prepared immediately subsequent to the suicide, reflects what transpired. Petitioners submitted this attested evidence to the District Court:

> . . . He was then taken to the police station and given a breath test. The subject registered 13% [*sic*] on the breathalyzer. Subjects [*sic*] property then inventoried where writer discovered subject

had 3 green and black capsules markings AHR 6257. He related they were for pain because he had been injured in the past, that is shot in the face. The capsules identified in PDR as Phenaphen with Codeine were confiscated and held as evidence.

Subject Danese then made a phone call, the way he was speaking sounded as if he spoke with his mother. It seemed he was concerned over the car that was impounded when he was arrested. The car belonged to his grandmother he was concerned that he needed to get the car to his mother this morning. From the conversation it sounded as if the mother was concerned on how and where, and how much it would cost to get the car out of the pond [*sic*]. Patl. Chuchran then handed card identifying towing service and location, to subject Danese. He then conveyed the information to his mother. His mother seemed persistent in her concern over the car from the conversation it seemed she needed the car this morning for a job interview. Also that she did not have the money for the impound fee. Danese then told his mother that he had $25.00 cash that in the morning she should stop at the station and pick up the money for the impound fee. That he didn't need the money, his bond was $100 and he was going to jail anyway. (He had conveyed to us his concern over the fact that he was recently on probation for a felony arrest and he felt that this would affect his probation status) He was crying as he ended the conversation with his mother. He then made another call to a person with whom he made arrangements for that person to pick-up his mother and transport her to the station. He then hung up the

> phone. He had high-cowboy type boots on he was told to remove same as he could not wear them in the cell area. He said, I cant [*sic*] kill myself with my boots they dont [*sic*] have any laces, I'm not going to do that anyway.
>
> Prior to his phone call, subject Danese was joking with a State Police prisoner. The subject was told to remove his laces from his shoes. Danese told the subject that he had to give up his laces to prevent his attempting suicide. Danese was jovial and joking with this other prisoner whose first name was David the same as Danese. (R: 170, pp 551-553)

Respondent Chuchran prepared a post-suicide report. Petitioners submitted his deposition-attested report to the District Court. Chuchran states, in pertinent part:

> When writers arrived at the station the M.S.P. [Michigan State Police] were using the booking room for a O.U.I.L. arrest.
>
> While waiting to use the breath test, David was telling a story about how he was shot in the jaw about 1 year ago.
>
> David also said that he was on Probation for a felony.
>
> The M.S.P. Officers Thompson and Harrington were in the process of taking property away from their prisoner. A David Anthony Pastorisa w/m 7-26-60. David then made a comment that 'They take everything away from you that you could hang yourself with.' David then took the breath test.
>
> While waiting for the results David was joking with the other prisoner David about having to

remove shoe laces so he couldn't hang himself. The conversation turned to being in a car accident while being drunk and dying — the two were obviously joking about being arrested.

David Danese then made a comment 'I wish I weren't here.' Writer then told David 'you really don't mean that.' David replied that 'he was $13,000 dollars in debt.' Writer replied that 'I am in debt for more than that.' David stated that 'I owe the doctors $8,000 and the hospital $5,000' for the gunshot wound to the face.

Writer told David that $13,000 wasn't that much. David then took the second breath test.

David was informed the [*sic*] he would be in jail until 8 am and he could be released on $100.00 cash bond. David then made a phone call.

Writer, sitting next to-David while he was talking on the phone. David was telling the person to come to the police station to get $25.00 so they could get David's grandmothers [*sic*] car out of the Impound yard. Writer gave David a card and explained where Wohlfield's was. David relayed the info to the person he was talking to. Writer believes he was talking to his mother. David, while talking to the person, had tears in his eyes. David said that she should get the car, and not to worry about him. David asked to make another phone call and was allowed to. Writer believed he called his father. David asked this Party to pick up his mother so she could get the car out of Impound, so she could get to work. David then hung up.

Patr. Gowsoski then had David remove his jewelry and empty his pockets.

> David emptied his pockets, removed his necklace & watch. David then said that his ring, (on his right hand) does not come off. David said 'If you want it off you'll have to break my finger. I can't hang myself with it anyways.' Patrol told David that he could keep the ring. David was then told to remove his boots he said 'why I can't hang myself with them.' David seemed to be joking with Patr. Gowsoski & myself. David seemed in good spirits as Patr. Gowsoski checked him for anymore property before placing him in the cell area. (R: 170, pp 554-556)

During the booking process, a breathalyzer test was administered by Respondent Cardinal. Cardinal, between the first and second test, overheard Mr. Danese state to a third person, "I wish I wasn't here." The post-suicide report, attested by deposition, was submitted in the record by Petitioners. It continues:

> Mr. Danese was asked what he meant and he replied 'Well ever since I was shot, there are medical bills in excess of $13,000.' He continued on to say 'and I don't know how I am going to pay them off.' The conversation went on about how Mr. Danese was shot in the face with his own gun and writer administered second breath test with results of .13% Writer finished the test and went up front to resume my dispatch duties.
>
> At approx. 5:15 a.m. 11-9-82 writer heard one or both of the prisoners banging on the bars and yelling for an officer. Writer went back to the cell block door and asked both prisoners what they wanted. Mr. Danese who was in the center cell replied he wanted a cigarette. Writer informed him that it was against the rules to smoke in the cell block area and for him to

> attempt to get some sleep. Mr. Danese replied 'If I don't get a cigarette, I'm going to hang myself.' Writer replied for him to go to sleep and returned to the dispatch area. Writer informed SGT Hill of the conversation between myself and the prisoner, Mr. Danese. SGT Hill advised that we would have to watch him.
>
> Writer began working on the daily log, occasionally looking up at the cell block cameras. The left camera which covered the cell block that Mr. Danese was in has poor visual qualities. It appears the picture tube is going bad as the border is coming in towards the center of the screen and it is difficult to view the cell block area. After finishing the log, writer ran a gun permit application through the computer and SGT Stein walked in from lunch. Writer walked back to the cell block for a 6 a.m. inspection and found Mr. Danese hanging from the bars with his white shirt. Writer ran up to the front and yelled to Officer Kenyon and SGT Stein that a prisoner was hanging in the cell block. Writer obtained the keys from the key rack and opened up the cell block doors. While Mr. Danese was being cut down, writer called for the Fire Dept. ambulance . . . (R: 170, pp 547-548)

Respondent Hill's post-suicide report was submitted to the District Court by Petitioners after being attested in deposition. In pertinent parts, the report states:

> After 4:00 a.m. Officer Gowsoski came to the front desk and informed writer that the arrested party said he needed a pillow because he could not lay flat because of an old injury. Officer Gowsoski was informed we did not have any pillow and to inform him of that. Sgt. Stein was

> in the station and was leaving about 5:10 a.m. At this time writer walked back through the cell block and checked the prisoners continued back to the garage checking the veh's parked outside through the garage windows. On returning to the radio room officer Cardinal informed writer the subject banging and yelling in the cell wanted a cigarette. When Cardinal informed him he could not smoke in the cell he (the prisoner) stated if I can't smoke I will hang myself. Writer informed Cardinal we would have to watch him. Approximately 5:20 a.m. officers Gabriel and Kenyon came into the station. Writer asked Gabriel to follow writer home and return him to the station after dropping his car off. Writer & officer Gabriel left the station about 5:35 a.m. to 5:40 a.m. As we returned to the station approximately 6:00 a.m. and notified by Sgt. Stein the above subject had hung [*sic*] himself in the cell[.] He had already been cut down and the Fire Department ambulance was on the way. (R: 170, pp 549-550)

Without explanation, Petitioners state "Between 5:35 a.m. and 5:56 a.m., Danese hanged himself." While the record does not reflect the actual source of this fact, Respondents presume it is culled from Sgt. Hill's extra-record deposition testimony at pages 82 and 90. Sgt. Hill has testified that he visually inspected David Danese before leaving the station to drop off his automobile and saw Mr. Danese standing and talking to prisoner Pastorisa.

In an apparent error, Petitioners state the Fire Department rescue truck arrived at "5:50 a.m.," which would be six minutes before Mr. Danese was discovered hanging. The record of the case indicates the Fire Depart-

ment rescue truck arrived at 5:59 a.m., within three minutes of the discovered hanging. (R: 150, p 427)

III.

MEDICAL AND SUICIDAL PRECAUTIONS IMPLEMENTED BY RESPONDENT ASMAN

Petitioners offered in the record Roseville Police Department procedures for housing prisoners, for provision of medications and medical attention, and for handling of inmates whenever an officer believed he was presented with a prisoner who was possibly suicidal. (R: 169, pp 515-516)

These protocols required:

> 4. Never place unconscious prisoner in jail.
>
> * * *
>
> 11. Sick and injured prisoners shall be afforded necessary medical attention.
>
> 12. Prisoners taken to medical facility shall be covered by incident report.
>
> 13. Only medication ordered by a physician shall be given to prisoners.
>
> a. Officers to notify shift commander if medication is required.
>
> b. Shall be administered by shift commander.
>
> c. Make supplemental incident loging [*sic*] all medication given. (R: 169, p 515)

Suicide prevention protocols issued by Respondent Asman were:

> The department expects officers to observe subjects arrested in attempt to identify those per-

sons that exhibit tendencies to commit suicide. General traits of a person so inclined are:

1. Most suicides occur within the first 12 hours of confinement.
2. Use of drugs or alcohol.
3. Recent loss of job.
4. Recent loss of loved one through death, divorce, or separation.
5. History of emotional illness.
6. Emotional problems at time of arrest.
7. History of previous suicide attempt.
8. Older persons have a higher suicide rate.

Should an officer observe one or more of these factors present in an arrested subject, and feel that the possibility of an attempt at suicide is present, then he shall notify the shift commander who will:

1. Determine if subject should be taken to mental facility.
2. Determine if subject should be taken to medical facility.
3. If subject is lodged in jail, place subject where he can be observed by video camera and other inmates, if possible.
4. Make hourly visits as required, and more frequently as circumstances dictate. (R: 169, p 516)

IV.

RESPONDENTS ASMAN AND PETERS' NOVEMBER 9, 1982 INVOLVEMENT

Respondent Asman is the Chief of Police for the City of Roseville. Respondent Peters is an Inspector with the Police Department. The Complaint does not allege either were present at the police station at the time of Mr. Danese's arrest and subsequent suicide.

The Complaint contends Chief Asman and Inspector Peters failed to train their staff in suicide risk assessment and prevention, and that they did not build a lockup in conformity with Michigan Regulations prior to the death of Mr. Danese. (R: 208, p 162)

The Petitioners' evidence submitted to the District Court reflects a new detention facility was being planned in 1982 and that actual construction occurred after Mr. Danese committed suicide. (R: 135, pp 410-415)

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT PROPERLY HELD THAT AS OF NOVEMBER 9, 1982, A CONSTITUTIONAL DUTY WAS NOT ESTABLISHED, NOR PARTICULARIZED, REQUIRING LOCAL POLICE OFFICERS TO IDENTIFY PRETRIAL DETAINEES AT RISK FOR SUICIDE, AND TO PREVENT SUICIDE THROUGH SUICIDE SAFE CONDITIONS OF CONFINEMENT AND/OR MEDICAL CARE WHICH WOULD PREVENT SUICIDE.

As an attempt to persuade this Court to issue Writ of Certiorari, Petitioners engage in an egregious characterization of the Sixth Circuit's decision in this case. To begin, the Opinion of the Sixth Circuit is reported in

an edited fashion. As reported in Petitioner's Brief, the Sixth Circuit Opinion is made to appear as though it recognized a clearly established duty:

> The Sixth Circuit states:
>
> > '. . . the plaintiffs and the district court in this case have not presented any cases that contradict the Fifth Circuit's holding . . . that a **constitutional duty to protect prisoners from self destructive behavior was clearly established** at the time Gagne was arrested . . .' (Cf. Petitioners' Brief, p 9, footnote 11, *emphasis supplied by Petitioners*)

Having quoted the Sixth Circuit Opinion as stated above, with selected emphasis, Petitioners then claim that the Sixth Circuit imposed an obligation upon them to cite precedent for the "very action" of the police officers showing such to have been "previously . . . unlawful." (Cf. Petitioners' Brief, pp 8-9)

The Sixth Circuit did not state that a Fifth Circuit decision had previously recognized the existence of a clearly established Constitutional duty to protect prisoners from self-destructive behavior. Contrary to the impression created by the Petitioners, the Sixth Circuit held there was not any clearly established duty:

> Our conclusion is supported by the decision of the Fifth Circuit in *Gagne* v *City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986), Cert. denied, 107 S.Ct. 3206 (1987). The court in *Gagne* held that a policeman who, in violation of a prison regulation, did not remove a belt from a detainee who later hung [*sic*] himself was entitled to qualified immunity. The court held that no cases were presented 'suggesting that a constitutional duty to protect prisoners from self-destructive

> behavior was clearly established at the time *Gagne* was arrested.' *Ibid.* As the events in *Gagne* took place after the events here and the plaintiffs and the District Court in this case have not presented any cases that contradict the Fifth Circuit's holding, we are led to the same conclusion the court reached in *Gagne*. (Petitioners' Appendix B, pp B-9 – 10)

The Sixth Circuit did not issue an opinion in this case indicating that any of the specific duties contended by Petitioners existed. The Sixth Circuit did not hold that any of the duties contended by the Petitioners were clearly established. The Sixth Circuit did not hold Petitioners to an exalted standard that Petitioners must show in addition to a general duty, and a clearly established duty, specific case precedent requiring the "very action" taken by the officers "previously been held to be unlawful."

The Sixth Circuit observed that pertinent case authority of the Fifth Circuit had previously held no clearly established Constitutional duty existed as contended by the Petitioners. The Sixth Circuit reinforced its observations by pointing out that neither the Petitioners, nor the District Court, had cited any authority that purportedly established as of 1982 a clear Constitutional duty as claimed in the pleadings.

Proceeding from the false assumption that the Sixth Circuit had recognized the existence of a clearly established duty pursuant to the *Gagne* decision, Petitioners then criticize the Sixth Circuit for not determining whether a substantial consensus of opinion existed at the time of the incident indicating that Respondents' course of conduct infringed upon the "right" so protected. (Petitioners' Brief, p 10)

Contrary to Petitioners' contentions, the Sixth Circuit was presented with pertinent law from many Circuits by all parties to this proceeding, including an *amicus curiæ* brief from the City of Detroit. The Sixth Circuit found no duty was clearly established as contended by the Petitioners.

In essence, the Petitioners contend that lay police officers were Constitutionally required, as of 1982, to be sufficiently educated to differentiate between the actions of a manipulative inmate and that of a serious, suicidally-inclined prisoner.

In attempting to persuade this Court to issue Writ of Certiorari, the Petitioners have also revised the facts of that claim in light of the disposition of the Sixth Circuit. Before the Sixth Circuit, the Petitioners readily acknowledged that David Danese stated to Officer Cardinal, "If I don't get a cigarette, I'm going to hang myself." (Petitioners' Brief on Appeal to the Sixth Circuit, p 9, ¶ 5)

However, in presenting the Statement of the Case to this Court, Petitioners omit reference to the actual statements made by the Decedent. Instead, this Court is told something different from that stated to the Sixth Circuit and something different from the undisputed evidence of record. This Court is told, "At approximately 5:15 a.m., Danese advised Officer Cardinal that he was going to 'hang' himself." (Petitioners' Brief, p 3)

Petitioners now seek to rely upon the pleadings, notwithstanding the undisputed record they have submitted to the lower courts. Petitioners seek to retreat to their First Amended Complaint, ¶ 29. That paragraph states, "At approximately 5:15 a.m., the Deceased informed Defendant CARDINAL that he was going to hang himself." (R: 38, p 28)

Petitioners contend this was "admitted" by Respondents. This naked allegation was admitted, since the undisputed evidence reflected that Danese used those very words when he said, "If I don't get a cigarette, I'm going to hang myself." The First Amended Complaint, thereafter, does not state the full text of his actual words, nor does the Third Amended Complaint allege these actual words used were an unequivocal threat as now suggested in the Petition.

In conclusion, it would appear that the Petitioners have misunderstood or misstated the legal reasoning of the Sixth Circuit. Moreover, the Petitioners have retreated from the admitted, attested, undisputed facts of the case to now suggest that the Decedent made an unequivocal threat and decision to commit suicide which was then ignored by the Respondents.

The case which the Petitioners would ask this Court to review is not the case that was pending before the District Court, nor is it the case that was reviewed by the Sixth Circuit.

A. The Decision Of The Sixth Circuit Does Not Conflict With Its Prior Opinions Regarding The Rendering Of Medical Care.

Prior to November 9, 1982, the Sixth Circuit had not held, or particularized, that local police officers must screen all prisoners and diagnose whether such prisoners were, in fact, suicidal. The Sixth Circuit had not ruled what conduct was lawful, or unlawful, regarding the management of a prisoner who was, in fact, suicidal.

The authorities cited by Petitioners would not have placed Respondents on notice that their custodial conduct towards David Danese was allegedly unlawful.

The operative facts of this case are simple and clear. David Danese did not make an unequivocal statement that he was going to hang himself. He did not request any medicine or medical care. While noting Respondents confiscated narcotics from Mr. Danese, Petitioners do not allege Mr. Danese had a lawful prescription for these drugs, or that he requested any of these narcotics for pain.

Fitzke v *Shappell*, 468 F.2d 1072 (CA 6, 1972), cited by Petitioners, involved a request for medical care for physical injuries sustained in an automobile accident. The Sixth Circuit held that such a request, coupled with circumstances clearly sufficient to indicate a need of medical attention, obliged custodial officials to provide medical care under the Due Process clause of the U.S. Constitution. The refusal to provide medical care as requested was the gravamen of the case, not the failure to diagnose conditions, differentiate real from imaginary, and then treat without request.

Shannon v *Lester*, 519 F.2d 76 (CA 6, 1975), cited by the Petitioners, involved a request by an injured motorist for medical attention while being transported to jail after his arrest for Driving While Intoxicated. The request was refused. A second request, which was again refused, was made at the jail to the jail deputy. Mr. Shannon manifested facial lacerations and swelling. He had a non-displaced fracture of the nose and a displaced fracture of the ulna (elbow). The *Shannon* Court held a detained person is entitled to necessary medical care on account of an injury or illness when requested, and a refusal by prison authorities, with knowledge of that condition, to provide medical care violates the due process rights of the prisoner.

The *Shannon* Court did not hold that the Due Process Clause imposed a duty on police officers to medically screen pre-trial detainees, diagnose conditions

despite lack of complaint or request for care, and then undertake unrequested medical treatment.

Scharfenberger v *Wingo*, 542 F.2d 328 (CA 6, 1976), cited by Petitioners, involved personal injury (an amputation) caused by the refusal of custodial officials to provide medical care recommended by a physician in consequence of the prisoner's prior self-injury. There, the Defendants had the benefit of prior medical diagnosis and medical instruction. Again, the gravamen of *Scharfenberger* does not pertain to the alleged failure of local lay police officials to diagnose conditions, differentiate real from imaginary, and then treat without request.

Westlake v *Lucas*, 537 F.2d 857 (CA 6, 1976), cited by Petitioners, involved pleas for medical assistance made by a prisoner by virtue of a bleeding ulcer. The prisoner told the jailers he suffered from an ulcer and requested appropriate medical attention — which was denied. In that case, the Sixth Circuit did not hold that local jailers must medically screen prisoners for undisclosed problems, diagnose and differentiate real from imaginary, and then treat without request.

Petitioners contend that the Sixth Circuit failed to follow the decisions of *Roberts* v *City of Troy*, 773 F.2d 720 (CA 6, 1985) and *Davis* v *Holly*, 835 F.2d 1175 (CA 6, 1987), neither of which declares the duties claimed here. More importantly, Petitioners do not explain how the Respondents would have known of the law discussed in these two cases decided years after the incident in this case.

In summation, these proffered authorities do not support Petitioners' contentions of an established legal duty, much less that such duty was "clearly established."

B. The Decision Of The Sixth Circuit Does Not Conflict With The Decisions Of The Second, Third,

Fourth, Fifth, Seventh, Eighth, Tenth And Eleventh Circuits.

Petitioners contend the Sixth Circuit's Opinion in this case contradicts binding precedent from numerous Circuits. Petitioners' cited authorities, most of which were published after Mr. Danese's death, do not hold that a police officer must medically screen for suicide risk, diagnose and provide suicide-safe facilities:

Bishop v *Stoneman*, 508 F.2d 1224 (CA 2, 1974) involved a review of what evidence was sufficient to show deliberate indifference in the context of indifference to medical needs. *Bishop* does not declare the duties averred by the Petitioners, nor is it a Rule 56 case.

Colburn v *Upper Darby Township*, 838 F.2d 663 (CA 3, 1988), cited by Petitioners, involved an incident that occurred three years after Mr. Danese's death. Moreover, unlike this incident, the prisoner was not searched, suicidal precautions were not taken, and supervision was not established. The victim was specifically known to police as having actually attempted suicide and was a known suicide risk. Finally, *Colburn, supra*, did not involve a Rule 56 motion, as does this case. Cf. *Colburn*, p 669.

Bowring v *Godwin*, 551 F.2d 44 (CA 4, 1977), involved a request by a prisoner for psychiatric diagnosis and treatment. More importantly, *Bowring* required treatment be provided if a physician or medical care provider, using his medical skills, concluded with a certainty the prisoner's symptoms evidenced a serious medical need, which may be substantially alleviated.

Partridge v *Two Unknown Police Officers*, 791 F.2d 1182 (CA 5, 1986) did not hold local police must screen and diagnose suicide risks on or before 1982. Moreover, *Partridge* was not a qualified immunity decision. *Gagne, supra*, which was a qualified immunity case, specifically discussed the applicability of *Partridge*, and held qualified immunity applied to a May 17, 1983 suicide:

> Indeed, the case of *Partridge* v *Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986), shows that the possible existence and scope of such a duty has only very recently begun to attract attention in this circuit. (*Gagne*, p 560)

Cleveland-Perdue v *Brotsche*, 881 F.2d 427 (CA 7, 1989) is factually distinguishable. This prison case observed that the absence of systemic medical measures (policies, records, training) was actionable in the context of medical services rendered by medical professionals at a permanent detention facility. Petitioners have documented the opposite occurred in this case, namely, Respondent Asman implemented medical protocols and suicide protocols to remedy a 1977 occurrence of suicide. *Cleveland-Perdue* is not authority for the duties advanced by the Petitioners.

Finney v *Arkansas Board of Corrections*, 505 F.2d 194 (CA 8, 1974) is a penitentiary case which does not address the duty claimed by Petitioners. It is not a suicide case, nor does it address the specific duties otherwise owed by temporary detention lay personnel to prisoners who might pose a risk for suicide.

Garrett v *Rader*, 831 F.2d 202 (CA 10, 1987) involved the intentional physical abuse, and ultimate death, of a mentally retarded patient, apparently judicially committed to a state institution. Petitioners fail to explain how this authority establishes the alleged 1982 duties of suicide diagnosis and prevention asserted applicable to police officers who temporarily detain arrestees.

Waldrop v *Evans*, 871 F.2d 1030 (CA 11, 1989) involved the duties of a prison physician owed a psychiatric patient. This case does not address the responsibilities of a police officer owed to a temporarily detained arrestee, much less a duty of a police officer to diagnose and manage a suicidal person.

Having argued the applicability of the foregoing authorities, Petitioners then criticize the Sixth Circuit for observing the risk presented by Mr. Danese was one of uncertainty. To state the Sixth Circuit's observations are "irrelevant," on the premise that Mr. Danese, unequivocally, announced he was going to "hang himself," is to argue from a false premise. Cf. Petitioners' Brief, p 13. It is the Petitioners who documented the undisputed uncertainty of Mr. Danese's intentions by submitting his actual remarks to the Sixth Circuit. Mr. Danese's complete, actual words were, "If I don't get a cigarette, I'm going to hang myself" and not, "I'm going to hang myself."

Since the Sixth Circuit relied upon the undisputed, attested facts of record, Petitioners should not take umbrage over the Sixth Circuit's observation that Respondents could not be certain that Mr. Danese would attempt suicide:

> How much more certainty is required?
>
> Danese told the officers he needed psychological help; he said, 'I'm going to hang myself.' The officers decided 'we better watch him.' Petitioners submit that's as certain as it gets. (Petitioners' Brief, p 14)

A Writ of Certiorari should not issue on matters fabricated from whole cloth. Petitioners cite no attested fact or pleading which states Mr. Danese told anyone he needed psychological help or made an unequivocal threat. Most assuredly, Petitioners did not advise the Sixth Circuit of any such extra-record claims.

II.

THE SIXTH CIRCUIT DID NOT ERR IN DETERMINING A "HISTORIC LIBERTY INTEREST" IN "SAFE CONDITIONS OF CONFINEMENT" WAS NOT CLEARLY ESTABLISHED AND PARTICULARIZED IN 1982 SUCH THAT

LOCAL POLICE OFFICIALS MUST PROVIDE SUICIDE-PROOF FACILITIES TO UNDIAGNOSED PRE-TRIAL DETAINEES NOT OTHERWISE REQUESTING MEDICAL ATTENTION.

Petitioners contend the decision of the Sixth Circuit is "in direct conflict" with the Court's decision in *Youngberg* v *Romeo*, 457 U.S. 307, 73 L. Ed.2d 28, 102 S.Ct. 2452 (1982). (Petitioners' Brief, p 15)

Petitioners do not explain how the facts in *Youngberg, supra*, would have apprised Respondents that it would be unlawful to house an undiagnosed pre-trial detainee, who did not request medical or psychological treatment, in anything but suicide-proof custodial facilities.

The victim in *Youngberg* was a judicially-declared incompetent. Inherent in the status of the victim was that his medical condition (mental retardation) was previously diagnosed and adjudicated. With these matters previously determined, and with specific knowledge that Romeo had suffered up to 63 injuries, some self-inflicted, it was incumbent upon those custodians to provide appropriate facilities for management of the incompetent who was actively attempting self-injury or was being victimized by assault.

The facts of *Youngberg, supra*, are a far cry from Danese's attempts to manipulate Respondent Cardinal for a cigarette. The record fairly admits Danese knew the Roseville Police were trained to take measures to prevent prisoner suicide and were, in fact, doing just that when he was housed. He knew they were considerate of his feelings and had tried to reassure him that his financial troubles were not as bad as stated. The objective facts admit he tried to manipulate their concerns for his well-being and for preventing suicides by demanding a cigarette in the manner that he did.

Notwithstanding, Petitioners translate *Youngberg, supra,* into an apparent judicial fiat that all police lockups throughout the United States must be immediately refitted/rebuilt such that undiagnosed pre-trial detainees cannot effect an act of suicide. Petitioners' facile contentions ignore whether such technology actually exists.

The record reflects that Petitioners have admitted local police facilities are not required to have CCTV. (R: 1Z0, p 534, ¶ 4) Contrary to Petitioners' contentions, the record admits that Mr. Danese was properly held in a holding cell, which is precisely what Michigan Department of Corrections Regulations appear to require:

> "Lockup" means a facility operated by a unit of local government for the physical detention and correction of persons charged with or convicted of criminal offenses for a period of less than 48 hours. (1979 AC R. 791.503(4))
>
> * * *
>
> A * * * lockup shall provide 1 or more holding cells * * * .(1979 AC R. 791.557(1))
>
> * * *
>
> "Detoxification cell" means a cell used to temporarily hold 1 or more chemically impaired persons during the detoxification process until they can care for themselves and be moved to general housing areas. (1979 AC R. 791.501(4))
>
> * * *
>
> A person confined to a detoxification cell shall be moved to a general housing area as soon as he can properly care for himself. (1979 AC R. 791.641(1)(c))

The record objectively admits that David Danese could not care for dangerous machinery operated on a public highway at 2:50 a.m. on November 9, 1982. In

contrast, the record admits Mr. Danese could care for himself subsequent to his arrest. The record does not reflect that David Danese was detoxifying. (Petitioners persistently insist in using the term "detoxification," equating it with "sobering." The Federal judiciary does not. See *Alberti* v *Sheriff of Harris County, Texas*, 406 F.Supp. 649, 677 (1975). Nor does the corrections health care industry. See the analysis provided by *amicus curiæ* brief to the Sixth Circuit.)

Petitioners' actual contentions address matters of police officer judgment concerning appropriate housing decisions standardized by state regulations, discussed above, which were repealed in 1984. MCLA 791.262(5); MSA 28.2322(5).

The alleged violation of state regulations (notably now repealed) fails to state a claim under 42 U.S.C. § 1983. *Davis* v *Scherer*, 468 U.S. 183, 82 L.Ed.2d 139, 104 S.Ct. 3012 (1984); *Williams* v *City of Lancaster, Pa.*, 639 F.Supp. 377 (E.D. Pa., 1986); *Wright* v *Wagner*, 641 F.2d 239 (CA 5, 1981).

Petitioners have not shown any error of the Sixth Circuit's holding that the "right" asserted by Petitioners was not particularized such that Respondents would have known their conduct unlawfully violated the Constitutional rights of David Danese.

III.

PETITIONERS HAVE NOT SHOWN THE COURT SUFFICIENT JUSTIFICATION TO WARRANT A WRIT OF CERTIORARI IN THIS CASE TO CONSIDER WHETHER A PRE-TRIAL DETAINEE HAS A CONSTITUTIONAL RIGHT TO BE PREVENTED FROM COMMITTING SUICIDE.

Petitioners have retreated from their admissions that the attested facts of the case do not show Mr. Danese made an unequivocal, serious threat of committing suicide.

Because it was so, Petitioners must advocate a duty to diagnose a psychiatric malady and prevent a suicidal occurrence without necessity of a request from the prisoner.

Respondents have restated the Petitioners' instant contention that an intoxicated prisoner, who "manifests suicidal ideation through threats or otherwise" is owed a duty of diagnosis and prevention under the U.S. Constitution. Respondents feel it is of little moment that a seriously suicidal inmate is male, female, sober, drunk, drugged, old, young, white, black, United States citizen, or not. Respondents do not believe the rights of any human being should be predicated upon such distinctions or "profiles" proffered by Petitioners in their Third Amended Complaint. (R: 234) Respondents believe these distinctions suggested by Petitioners are merely self-serving and do not seriously address an issue of Constitutional import.

Respondents contend this Court should not issue a Writ to address this issue suggested by petitioners. Petitioners offer this Court a simple solution to a complex problem; namely, that a lay police officer can be reliably trained by someone to reasonably diagnose a certain suicide risk and can prevent that occurrence with suicide-proof facilities. Petitioners have not made any showing in this record at any time such a reliable, simple solution exists.

The record should reflect that the City of Detroit submitted a brief *amicus curiæ* to the Sixth Circuit. That record brief provided the Sixth Circuit with a survey of "accreditation standards" pertinent to housing structures for pre-trial detainees, industry criticisms concerning use of CCTV for management of prisoners, and the genesis of general data being developed circa 1981 which investigated suicides in jails and how such occurrences might be prevented.

As that brief demonstrated, practical concepts of suicide detection and prevention were in the nascent stage in 1982, and continue to be developed.

Respondents believe this Court should hesitate to accept Petitioners' invitation to declare a duty existed in 1982 absent objective, reasonable assurances that ordinary policemen were capable of the task of fulfilling that duty.

In the final analysis, Respondents submit the issue herein raised is not the issue that was raised on appeal. The question raised is whether Respondents have qualified immunity for want of a clearly-established duty owed to David Danese which was particularized on or before November 9, 1982.

IV.

THE SIXTH CIRCUIT DID NOT IGNORE PETITIONERS' ALLEGED DUE PROCESS CLAIMS ASSERTED PURSUANT TO ADMINISTRATIVE REGULATIONS, NOW REPEALED, ADOPTED BY THE MICHIGAN DEPARTMENT OF CORRECTIONS.

Petitioners contend now-repealed administrative regulations of the State of Michigan, Department of Corrections, pertinent to various aspects of the operation and structure of local lockups, created a Constitutional "liberty interest" right under the Due Process Clause.

Petitioners fail to specifically identify the "liberty" they claim was violated. Petitioners fail to identify the "specific substantive predicates" that limited the discretion of Respondents as to how training should be done, the subject matter of that training, how suicidals would be determined and what should be done with a person who is determined to be suicidal. *Kentucky Department of Corrections* v *Thompson*, __ U.S. __, 104 L.Ed.2d 506, 109 S.Ct. 1904 (1989).

In an attempt to reach a threshhold argument, it appears that Petitioners argue certain regulations were "mandatory." Petitioners do not offer how these regulations applied to this case, or how these regulations provided specific limitations on the discretion or judgment of Respondents. (Petitioners' Brief, p 19)

Notwithstanding, Petitioners tell this Court:

> Review of the Michigan rules enacted seven (7) years before Danese's death and the existing case law establishes that Danese had an objective expectation that Respondents would operate, administer, staff and maintain their facility and equipment in conformity with these mandatory rules." (Petitioners' Brief, p 18)

The rules cited do not specifically require police officers provide diagnosis of suicide, or provide suicide-proof housing as claimed by Petitioners. The training regulations cited by Petitioners do not state what kind of training is required, nor do these regulations oblige Respondents to employ State training. (Petitioners' reference to 1979 AC R. 791.603(2) deleted the discretionary language of that rule. See Respondents' Appendix A for full text.) Petitioners' claims pertain to their displeasure over how Respondents exercised their discretion in fulfilling their regulatory duties.

Petitioners' current argument appears to be the rearguard of a failed argument that David Danese had a clearly established right, particularized as of 1982, to suicide prevention facilities and suicide screening, diagnosis and management via regulations, now repealed. Petitioners cite no administrative rule imposing such specific obligations upon Respondents.

The Sixth Circuit rejected Petitioners' contention that Michigan's since-repealed regulations created Constitutional rights, thinly veneered as a due process

"liberty interest," or otherwise. See fn. 5 at Petitioners' Appendix, p B-12.

V.

THE SIXTH CIRCUIT DID NOT ERR BY ALLEGEDLY IGNORING FACTS RECOGNIZED BY THE DISTRICT COURT.

Petitioners apparently assert that review in the Sixth Circuit is bridled by the District Court's assessment of the record, including undisputed facts not considered by the District Court. Petitioners cite no applicable authority for such proposition. If the District Court erred in its assessment of the record, procedurally or otherwise, it is the function of the appellate courts to review and correct that error.

Thus, for example, Petitioners assert that their contentions for construction of local law are binding upon the judiciary. They claim the Sixth Circuit erred in not accepting their contention that Michigan administrative regulations were *minimum* mandatory standards, citing no authority other than an apparent extra-record speech by a political official. (Petitioners' Brief, p 20)

More importantly, Petitioners appear to complain that the Sixth Circuit should not have accepted Petitioners' offered and admitted attested facts concerning the events which took place in this case. (See Statement of the Case, *supra*.) Petitioners offer this Court no valid justification for the contention that the Sixth Circuit erred in this respect.

Petitioners take exception with the Sixth Circuit for not accepting their contention that Respondent Asman is a liar, asserting his police officers were not trained to handle medical emergencies. Apparently, Petitioners believe the Sixth Circuit must ignore Petitioners' offered attested facts which show Respondent Asman issued to his staff protocols for medical management of

prisoners and for management of suicidal prisoners. (See Statement of the Case, *supra.*)

Petitioners apparently believe the Court must ignore the fact that since 1977 all Michigan police officers, with limited exceptions, must be academy-trained and certified. (MCLA 28.609; MSA 4.450(9)) and that such training must include First Aid (MCLA 28.221; MSA 4. 451). At no time have Petitioners averred the Respondents employed any Roseville Police Officer in violation of these mandatory laws. It appears that Petitioners' complaints pertain to a lack of more training.

Petitioners submit to this Court, and the Sixth Circuit, that Respondent Asman did nothing concerning these issues, but then state he issued pertinent medical and suicidal protocols on March 30, 1978. And, as though persuasive of the issue, Petitioners even note that, thereafter, a June 9, 1980 suicide attempt was thwarted by Roseville Police. (Petitioners' Brief, p 22)

Respondents submit the claim that more training or better training fails to state a claim under 42 U.S.C. § 1983. *Beddingfield* v *City of Pulaski*, 861 F.2d 968 (CA 6, 1988).

Petitioners seem to be undaunted by the fact that they have shown this Court, and the Sixth Circuit, that no act of deliberate indifference appears to have occurred in this incident. Petitioners have shown this Court, through their record motion responses, that Respondents specifically removed items from prisoners which could serve as instruments commonly used in suicidal hangings. Petitioners have shown this Court that surveillance of Mr. Danese was enhanced when he made his manipulative remarks. Petitioners have not shown any conduct of Respondents which was tantamount to an intent to punish anyone, including Mr. Danese. Cf. *Roberts, supra.*

At oral argument of this case before the Sixth Circuit, Counsel for Petitioners was confronted by the Court with the question of what act of deliberate indifference occurred, in light of the actions of Respondents Hill and Cardinal. Counsel seemed unable to intelligently answer.

In sum, this proffered issue is without merit. Petitioners' complaint seems to be that Respondents' demonstrated concerns for the welfare of Mr. Danese could have been manifested in a different way. That is possibly true, but alternative methods of concern do not make the attested acts of concern "acts of deliberate indifference," much less violations of any clearly established duty.

VI.

THE SIXTH CIRCUIT DID NOT ERR BY APPLYING THE WRONG STANDARD OF REVIEW ON A MOTION FOR SUMMARY JUDGMENT BY INCLUDING IN THEIR OPINION UNDISPUTED, ATTESTED FACTS OF RECORD SUBMITTED BY PETITIONERS.

Petitioners premise their argument on the contention that Respondents' Motion for Summary Judgment was submitted under F.R.C.P. 12(b)(6). It was not. Respondents' Motion for Summary Judgment was submitted under F.R.C.P. 56, as well. (R: 196, 215) Accordingly, the Respondents' defense addressed any undisputed, attested material facts that were developed subsequent to the pleadings. This was recognized by Petitioners who responded by providing the lower courts with the matters Respondents have previously discussed.

Apparently, Petitioners believe it is necessary to retreat from reality into fiction — at the expense of the Sixth Circuit and Respondents. As though Respondents suffer amnesia, Petitioners tell this Court that the only possible source of the data reported by the Sixth Cir-

cuit was evidence excluded by the Sixth Circuit. (Petitioners' Brief, p 26)

Respondents submit that even if the Petitioners had not offered the attested facts which were accepted by the Sixth Circuit, the Sixth Circuit was well within its authority under F.R.C.P. 56, in reviewing a motion of qualified immunity, to examine the record to cull the undisputed, attested material facts. *Unwin* v *Campbell*, 863 F.2d 124 (CA 1, 1988).

CONCLUSION

The Sixth Circuit properly concluded Respondents were entitled to qualified immunity because the alleged duties asserted by the Petitioners were not clearly established on November 9, 1982. Petitioners have not cited any case reflecting similar factual circumstances whereby the particularization requirement of *Anderson* v *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 90 L.Ed.2d 523 (1987), was demonstrated and satisfied on November 9, 1982. Even now, some eight years after the death of Mr. Danese, Petitioners have not cited any authority for the specific propositions they advance.

Respondents request this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: January 29, 1990

APPENDIX TO BRIEF IN OPPOSITION

• • •

APPENDIX A

RELEVANT STATUTORY PROVISIONS

MCLA 28.221

Sec. 1. The department of public safety is hereby authorized to establish and conduct a school for the instruction of law enforcing officers of this state and of the several counties, townships, cities and villages thereof, such school to be known as the Michigan training school for peace officers and to be conducted and the sessions and periods thereof to be held at East Lansing and at such other places in the state as the commissioner of public safety shall designate. Provision shall be made for instruction in the following subjects and such others as the commission of public safety shall deem expedient.

(a) Identification of criminals and fingerprinting;

(b) Methods of crime investigation;

(c) Rules of criminal evidence;

(d) Presentation of cases in courts;

(e) Making of complaints and securing of criminal warrants;

(f) Securing and use of search warrants;

(g) Enforcement of general criminal laws;

(h) Small arms instruction;

(i) Regulation of traffic and uniformity in enforcement;

(j) First aid;

(k) Ethics of the police profession;

(l) Courtesy in performance of duty;

(m) Jui Jitsu;

(n) Extent of police authority;

(o) Confessions and statements.

MCLA 28.609

Sec. 9. (1) The council shall prepare and publish minimum employment standards with due consideration to varying factors and special requirements of local police agencies relative to:

(a) Minimum standards of physical, educational, mental, and moral fitness which shall govern the recruitment, selection, and appointment of police officers.

(b) The approval of police training schools administered by a city, county, township, village, or corporation.

(c) Minimim courses of study, attendance requirements of at least 240 instructional hours, equipment, and facilities required at approved city, county, township, village, or corporation police training schools.

(d) The requirements in subdivision (c) shall be waived if the following occur:

(i) The person has previously completed the mandatory training requirements and

less than 1 year of police service, has voluntarily or involuntarily discontinued his work as a law enforcement officer, and is again employed within 1 year after discontinuing work as a police officer.

(ii) The person has served more than 1 year and less than 5 years, has completed the mandatory training requirements, and takes employment with another police agency within 18 months of discontinued service.

(iii) The person has served 5 years or more and takes employment with another police agency within 2 years of discontinued service.

(iv) The person is a member of a sheriff's posse or police auxiliary temporarily engaged in the performance of his duties and while under the direction of the sheriff or police department.

(e) Minimum qualifications for instructors at approved police training schools.

(f) Minimum basic training requirements which regularly employed police officers excluding sheriffs shall complete before being eligible for employment.

(g) Categories or classifications of advanced in-service training programs and minimum courses of study and attendance requirements for these categories or classifications.

(h) The establishment of subordinate regional training centers in strategic geographic locations in order to serve the greatest number of

police agencies that are unable to support their own training programs.

(i) Acceptance of certified basic police training and experience received in states other than Michigan in fulfillment in whole or in part of the minimum employment standards prepared and published by the council.

(2) Notwithstanding any other provision of this statute, a regularly employed person employed on or after January 1, 1977, as a member of a police force having a full-time officer shall not be empowered to exercise all the authority of a peace officer in this state, nor employed in a position which is granted the authority of a peace officer by statute, unless the person has complied with the minimum employment standards prepared and published by the council pursuant to this section. Law enforcement officers employed before January 1, 1977, may continue their employment and participate in training programs on a voluntary or assigned basis but failure to meet standards shall not be grounds for dismissal of or termination of employment. A law enforcement officer employed before January 1, 1977 who fails to meet the minimum employment standards established pursuant to this section and who voluntarily or involuntarily discontinues his work as a law enforcement officer may be employed with a law enforcement agency if that officer meets the requirements of subsection (1)(d)(iii).

MCLA 791.262(5)

(5) Except as provided in subsection (3), the department shall not supervise and inspect, or promulgate rules and standards for the administration of, holding cells, holding centers, or lockups. However, the department shall provide advice and services concerning the efficient and humane administration of holding cells, holding centers, and lockups at the request of a local unit of government.

1979 AC, R. 791.501(4)

(4) "Detoxification cell" means a cell used to temporarily hold 1 or more chemically impaired persons during the detoxification process until they can care for themselves and be moved to general housing areas.

1979 AC, R. 791.503(4)

(4) "Lockup" means a facility operated by a unit of local government used to detain persons charged with or convicted of criminal offenses for a period of less than 48 hours.

1979 AC, R. 791.557(1)

(1) A jail or lockup shall provide 1 or more holding cells with not less than 150 square feet of floor space or not less than 15 square feet per inmate, excluding benches, at capacity of the holding cell.

1979 AC, R. 791.603(2)

(2) It is recommended that the administrator should develop and implement a continuing orientation and in-service training program for correctional staff in conjunction with the standards recommended by the commission and training sponsored by the department of corrections.

1979 AC, R. 791.641(1)(c)

(1) A person arrested shall be confined or separated in a jail or lockup in the following manner:

* * *

(c) A person confined to a detoxification cell shall be moved to a general housing area as soon as he can properly care for himself.

No. 89-1049

In The

Supreme Court of the United States

October Term, 1989

JANET M. DANESE, Individually and as Personal Representative of THE ESTATE OF DAVID DANESE, Deceased; LOUIS DANESE, SR., DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE, and LOUIS DANESE, Individually,

Petitioners,

v

THOMAS A. ASMAN, Individually and as Chief of Police of the City of Roseville; ROBERT PETERS, Individually and as Inspector for the City of Roseville; HOWARD HILL and FREDERICK STEIN, Individually and as Sergeants and Shift Commanders for the City of Roseville; STEVEN GOWSOSKI, ROBERT CHUCHRAN, DENNIS CARDINAL and RICHARD KENYON, Individually and as Police Officers of the City of Roseville,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS GOWSOSKI, CHUCHRAN, CARDINAL & KENYON'S

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

RESPONDENTS OBJECT TO PETITIONERS' STATEMENT OF QUESTIONS PRESENTED. THE QUESTIONS DO NOT FAIRLY STATE THE ISSUES BEFORE THIS COURT, ARE ARGUMENTATIVE AND ASSUME FACTS THAT ARE NOT SUPPORTED BY THE RECORD. THE STATEMENTS THAT DANESE WAS "OBVIOUSLY SUICIDAL" AND "HAD THREATENED TO COMMIT SUICIDE" ARE CONCLUSIONS NOT SUPPORTED BY ANYTHING IN THE RECORD. IT WAS FAR FROM OBVIOUS THAT DANESE HAD SUICIDAL INCLINATIONS, AND THERE WERE NO UNEQUIVOCAL THREATS TO COMMIT SUICIDE. THE STATEMENT OF QUESTIONS PRESENTED ASSUMES A FACTUAL SITUATION THAT DID NOT EXIST IN THIS CASE.

THE ONLY ISSUE PRESENTED IN THIS CASE IS WHETHER POLICE OFFICIALS IN A LOCAL LOCKUP HAVE A DUTY TO RECOGNIZE NON-OBVIOUS CUES THAT A PRETRIAL DETAINEE, ARRESTED FOR DRUNK DRIVING, MAY BE CONTEMPLATING SUICIDE AND THEN TAKE ADEQUATE MEASURES TO PREVENT THE SUICIDE.

PARTIES

Respondents Steven Gowsoski, Robert Chuchran, Dennis Cardinal, Richard Kenyon are individual police officers employed by the City of Roseville. None of these officers hold supervisory rank. All were found by the Sixth Circuit Court of Appeals to be entitled to qualified immunity.

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No. 89-1049

In The

Supreme Court of the United States

October Term, 1989

JANET M. DANESE, Individually and as Personal Representative of THE ESTATE OF DAVID DANESE, Deceased; LOUIS DANESE, SR., DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE, and LOUIS DANESE, Individually,

Petitioners,

v

THOMAS A. ASMAN, Individually and as Chief of Police of the City of Roseville; ROBERT PETERS, Individually and as Inspector for the City of Roseville; HOWARD HILL and FREDERICK STEIN, Individually and as Sergeants and Shift Commanders for the City of Roseville; STEVEN GOWSOSKI, ROBERT CHUCHRAN, DENNIS CARDINAL and RICHARD KENYON, Individually and as Police Officers of the City of Roseville,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS GOWSOSKI, CHUCHRAN, CARDINAL & KENYON'S

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents accept the statement of the case as set forth in the Brief in Opposition to Petition for Writ of Certiorari submitted by Respondents ASMAN, PETERS, HILL and STEIN.

REASONS FOR DENYING THE WRIT

(Respondents adopt all of the arguments made on behalf of Respondents ASMAN, PETERS, HILL and STEIN in their Brief in Opposition to Petition for Writ of Certiorari.)

PREFACE

Petitioners claim, as a matter of Federal Constitutional Law, that Roseville Police Officers had a duty to recognize that DAVID DANESE was contemplating suicide and to either place DANESE under constant surveillance or provide him with immediate psychological treatment. Petitioners make a number of particularized allegations relating to the presence or absence of surveillance cameras, whether DANESE was placed in a detoxification cell, and etc. However, when stripped to their essentials, Petitioners' claim reduces to the formulation just stated: the officers had a duty to diagnose DANESE's suicidal intentions and place him under constant observation, so that he could not carry out those intentions.

There are essentially two issues that control the disposition of this case. First, whether there is any Constitutional right, at all, that was violated by any of the officers. Second, whether the officers are entitled to qualified immunity, assuming that there is such a Constitutional right.

I.

EXISTENCE OF CONSTITUTIONAL RIGHT

A. There Is No Substantive Duty To Screen A Pretrial Detainee For Suicidal Tendencies And The Police Officers Were Not Deliberately Indifferent To Danese's Medical Needs.

This Court has never explicitly held that pretrial detainees have a right to be screened for suicidal ten-

dencies and to be placed under constant observation, so that they cannot carry out their suicidal intentions. When this Court's recent precedents in this area are analyzed, it is clear that there is no such Constitutional right. The only substantive duty requires police officers not to be deliberately indifferent to the obvious medical needs of a detainee. DANESE made no unequivocal threat to commit suicide and his conduct, taken as a whole, would have permitted a reasonable police officer to determine that DANESE was not a substantial suicide risk. Since there was no evidence of deliberate indifference shown, Petitioners have failed to come forth with facts sufficient to support a claim of violation of a Constitutionally protected right.

There are three decisions of this Court which define the Constitutional issues involved in this case. The first of these cases is *Bell* v. *Wolfish*, 441 U.S. 520; 99 S.Ct. 1861; 60 L.Ed. 2d. 447 (1979). This case determined that, as a matter of substantive due process, pretrial detainees have a 5th Amendment right to be free of any punishment inflicted by prison officials. Essentially, this Court held that while prison officials may place restraints on the liberty of criminal suspects awaiting trial, each of these restraints must bear a reasonable relationship to either maintaining the security of the facility or preventing the escape of the detainees. While this case did not deal with medical treatment issues, the "no punishment" rule becomes extremely significant in light of a later decision by this Court.

The next significant case is *Estelle* v. *Gamble*, 429 U.S. 97; 97 S.Ct. 285; 50 L.Ed. 2d. 251 (1976). This case involved the medical treatment rights of a convicted criminal being held in a state correctional facility. This Court held that the 14th Amendment substantive due

process clause guaranteed that a convict had a right, derived from the 8th Amendment, to be free from "cruel and unusual punishment." "Deliberate indifference" to the medical needs of a prisoner would be considered cruel and unusual punishment.

The final case is *Youngberg* v. *Romeo*, 457 U.S. 307; 102 S.Ct. 2452; 73 L.Ed. 2d. 28 (1982). This Court held that a mentally retarded adult involuntarily committed to a state institution has a due process right to receive adequate medical care and treatment. Essentially, the Court held that the persons in charge of the institution must exercise professional judgment to determine what care, if any, is required.[1]

The Court appears to have adopted a continuum of rights. Those persons involuntarily committed because of illness or handicap are entitled to the most rights. Next on the continuum, come the rights of pretrial detainees who have not yet been adjudicated guilty of a crime. At the extreme end of the continuum are convicted criminals who may be punished provided the punishment is not cruel and unusual. However, in the context of screening for and preventing suicide, the substantive Constitutional tests all equate to the "deliberate indifference" standard which was correctly applied by the 6th Circuit Court of Appeals in this case.

Although, in general, the rights of pretrial detainees are greater than convicted criminals, in the context of providing adequate medical, including psychological, care, the Constitutional standards are identical. In *Estelle* v. *Gamble*, this Court held that developing

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[1] The case actually dealt with training, but all parties agreed that the State had a duty to provide medical care, and the Court so held.

standards of decency absolutely prohibited the withholding of medical care as punishment for a crime. Thus, it violates the 8th Amendment rights of convicts if the State is deliberately indifferent to their obvious medical needs.

A convict's right to be free from punishment through deliberate indifference to his medical needs is exactly equivalent to the right of pretrial detainees to be free of any punishment whatsoever. In either case, a State is absolutely prohibited from using denial of adequate medical care as punishment. In this context, the 8th Amendment right of convicts to be free of "cruel and unusual punishment" is identical to the 14th Amendment rights of pretrial detainees to be free of "punishment." Neither can be punished by denying medical care. It necessarily follows that the "deliberate indifference" standard of *Estelle* v. *Gamble* must apply equally to pretrial detainees.

Although this Court explicitly rejected an 8th Amendment analysis of the right to training of an involuntarily committed mentally retarded patient in *Youngberg* v. *Romeo*, this Court's analysis would reach the same result as the deliberate indifference standard if applied to the facts of this case. This Court rejected the argument that a State only has a burden not to be deliberately indifferent to the medical needs of involuntarily committed patients. The Court held, as a matter of substantive due process, that a State must provide minimal training necessary to insure the safety and freedom from bodily restraint of the patient. This requires that personnel at the institution exercise professional judgment as to the type of training needed.

However, this is just the first step in the analysis. The second step is determining the standards for breach of professional duty. This Court explicitly rejected a

negligence or medical malpractice standard. The Court, instead, held that liability may not be imposed unless the professional in charge of the institution did not base treatment decisions upon professional judgment, but, instead, relied on some extraneous considerations.

The first part of the test, if applied to pretrial detainees, would require jail officials to provide minimally adequate medical treatment to detainees. However, unlike involuntarily committed individuals who obviously require medical attention, since that is the basic reason for their commitment, pretrial detainees cannot be presumed to need any particular type of medical or psychological services. Someone would have to make a discretionary decision as to whether treatment was, in fact, necessary. That would invoke the second part of the test, which would require prison or jail officials to exercise professional discretion to determine whether psychological counseling, monitoring or medical treatment is necessary. As long as professional judgment is, in fact, exercised, jail officials would not be liable even if their actions were negligent.

It is submitted that this is no different than the "deliberate indifference" standard applied in *Estelle* v. *Gamble*. Unless *Youngberg* v. *Romeo* is read as requiring that all pretrial detainees be given a physical and psychological examination by licensed professionals at the point of arrest, and no court has ever held this, the initial decision as to whether medical or psychological treatment is necessary must be made by either the arresting officers or the person in charge of the lockup. This person, necessarily, would be a lay person, probably a police officer. That police officer would have to make a discretionary decision as to whether the detainee appeared to need medical or psychological attention. *Youngberg* v. *Romeo* would

only require that officer to exercise professional discretion, and the officer would not be liable even if his decision was negligent or otherwise breached professional standards. If the officer failed to exercise professional judgment, this would simply be another way of saying that the officer was deliberately indifferent to the medical needs of the detainee.

There is absolutely nothing in the record to indicate that any of the four individual police officers did anything which exhibited deliberate indifference to the possibility that DANESE might attempt suicide.

The police reports[2] do not indicate that DANESE was ill, injured, in pain or otherwise in distress. DANESE was apparently familiar with jails and booking procedures as he joked with another, less-experienced arrestee about the officers taking away his belt and shoelaces. DANESE indicated to the other detainee that these items were taken away to prevent suicide. DANESE objected to OFFICER GOWSOSKI taking away his boots and specifically stated that he couldn't kill himself with the boots, because they didn't have laces, and "I'm not going to do that anyway."

DANESE was given a breath test which established his blood alcohol level at 0.13%. This was high enough to give rise to a rebuttable presumption, under Michigan law, that his ability to operate a motor vehicle on the highways of the State was materially and substantially impaired.[3] However, DANESE appeared to be

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[2] The police reports are set forth, in full, in the Brief in Opposition to Petition for Writ of Certiorari filed on behalf of Respondents ASMAN, PETERS, HILL and STEIN at pp 2-9. All facts are gleaned from those reports which were submitted by Petitioners and which are not contradicted by any sworn testimony.

[3] Prior to 1967, though, DANESE would not even have been presumed under the influence. M.C.L. 257.625a(1)(b) read:

(*concluded on page 8*)

rational, oriented and able to take care of himself. He was able to make two phone calls, apparently to his parents, to make arrangements to have his car released from the police impound lot. There is nothing in the record to indicate that DANESE was going through alcohol withdrawal or that he needed medical detoxification.

DANESE did indicate that he was concerned about being $13,000.00 in debt and that "he wished he was not here."

Despite this, all of the officers noted that DANESE appeared to be "jovial" and in "good spirits."

Petitioner relies on so-called suicide profiles[4] which would indicate that a young, white male, arrested for a minor offense, who indicates signs of depression and has been using drugs or alcohol presents a high risk of suicide for which special precautions should have been taken. This so-called profile, however, describes almost every prisoner who is arrested for drunk driving. The published literature, moreover, indicates that such profiles are almost totally useless.

One such study is Beck, et al., "Hopelessness and Eventual Suicide: A Ten-Year Prospective Study of Patients Hospitalized With Suicidal Ideation," *American*

(*continued from page 7*)

> "(b) If there was at that time in excess of 0.05% but less than 0.15% by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant,"

[4] See, for example, paragraph 63 of the First Amended Complaint. (R: 38, p. 33.)

Journal of Psychiatry, 142; 5 (May, 1985). The authors studied 207 patients who were hospitalized because of suicidal ideation. The authors concluded that degree of depression had no predictive value in determining whether these patients who were already identified as suicide risks would actually attempt suicide. It was also noted that abuse of drugs and alcohol had no predictive effect. The authors concluded that the only reliable predictor of suicide was a so-called "hopelessness scale" which is an inventory administered by a clinical psychologist or psychiatrist as part of a detailed clinical interview. Even so, the researchers warn:

> "However, it should be kept in mind that the overwhelming majority of the patients with a Hopelessness Scale score over 9 did not commit suicide. Furthermore, a low Hopelessness Scale score is certainly no guarantee that a given patient will not commit suicide."

Suicide profiles were also analyzed in Kennedy, "A Theory of Suicide While in Police Custody," *Journal of Police Science and Administration,* 12; 2 (1984). Kennedy studied the widely-held belief that a potential suicide was most likely a young white male arrested for a minor crime or traffic offense and under the influence of drugs or alcohol. Kennedy concluded that there was no significant difference in suicide rates based upon age, race or reason for the arrest, and concluded, "It would appear that explanatory theories based on demographic variables would be of little use in the prediction and prevention of suicide."

Kennedy suggests that the suicidal inmate is the product of very complex sociological and psychological processes and offers no readily-applied formula for recognizing such an individual. To the contrary, Kennedy suggests that further research is needed and predicts that

a fundamental restructuring of prisons may have to occur.

Given the uncontroverted facts contained in the record[5] and given the fact that the medical profession offers little assistance in diagnosing a potential suicide, it is impossible to say that these officers exhibited a deliberate indifference to DANESE's psychological needs by not determining that he was potentially suicidal and taking effective steps to prevent his suicide. Since a Constitutional violation requires a substantial showing of deliberate indifference, the Sixth Circuit Court of Appeals was correct in dismissing the case as to the four individual officers.

B. No Procedural Due Process Claim Was Pleaded Since Petitioners Did Not Allege Any Violation Of Procedural Rights.

Petitioners make the argument that Roseville police officials violated mandatory regulations of the Michigan Department of Corrections and that these alleged violations deprived DANESE of liberty without due process of law. Petitioners, then, apparently presume that violation of the Department of Corrections[6] regu-

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[5] Petitioners make unsupported allegations that DANESE repeatedly stated he wished he were dead and made unqualified statements that he intended to kill himself. However, no sworn testimony was presented in support of those allegations, and it appears that the police officers were the only eyewitnesses to most of the material events. These allegations should be disregarded.

[6] It is far from clear that these regulations imposed any mandatory duties on local officials. First, any of the rules could be waived by the State under very nebulous standards. 1979 A.C., R. 791.511 provided:

> "Rule 511. (1) A facility shall comply with the requirements of these rules, except that the commission may grant a variance where it determines that:

(*concluded on page 11*)

lations either gives rise to a claim for damages or defeats qualified immunity. Petitioners are not attempting to enforce procedural rights and are not asking for a hearing.

(*continued from page 10*)

(a) Strict compliance would cause unusual difficulties and hardships.

(b) The exception meets the intent of the rule and would not seriously affect the security, supervision of inmates, programs or the safe, healthful, or efficient operation of the facility.

(2) In previously existing facilities where specific rules cannot be complied with because of unusual difficulty or undue hardship, exception to specific physical plant provisions of the rules may be made if the intent of the rules is met and the security, supervision of inmates, programs or the safe, healthful, or efficient operation of the facility is not seriously affected.

(3) When an exception to a rule is desired for a specific facility, the responsible local authority shall submit a written request to the commission stating the justification for the requested exception and documenting the claim that the exception meets the intent of the rule and will not jeopardize the security, supervision of the inmates, programs or the safe, healthful or efficient operation of the facility. An exception, if granted, shall apply only to the petitioner, for the specific situation or equipment cited and for the period of time specified."

Second, there was a great deal of controversy over whether the regulations could even be applied to local lockups. On September 21, 1982, the Michigan Court of Appeals decided the case of *Young* v. *City of Ann Arbor*, 119 Mich. App. 512, 326 N.W. 2d. 547 (1982). (The Court reconsidered its opinion at 125 Mich. App. 459, 336 N.W. 2d. 24 (1983)). It is doubtful if this case had been published at the time of DANESE's hanging. *Young* was the first appellate decision in Michigan to hold that the Department of Corrections had authority to regulate holding cells in local jails. The Michigan Supreme Court sent *Young* back to the Court of Appeals for reconsideration, 422 Mich. 901, 367 N.W. 2d. 333 (1985). The case was, then, the subject of a third opinion of the Court of Appeals, 147 Mich. App. 333, 382 N.W. 2d. 785 (1985) and the Michigan Supreme Court, with two dissents, denied leave to appeal, 425 Mich. 862 (1986).

In the meantime, the legislature settled the controversy by amending the statute to explicitly prohibit the Department of Corrections from exercising authority over local lockups. Public Acts of 1984, No. 102, M.C.L. 791.262(5).

Petitioners misunderstand or misrepresent the role of State regulations in a procedural due process context. While State laws can give rise to a liberty interest, this Court has never held that violations of those State laws can be the basis of a damage action in Federal Court.

This Court only relies upon State law to determine whether a "liberty" or "property" interest has been created. Violation of State law is entirely immaterial to this inquiry. In most of these cases, State officials have, arguably, followed State law to the letter. The real issue is whether State law provides Constitutionally adequate procedures for taking away rights that have been created by State law, not whether State law has been violated.

Whether the procedures are adequate is solely a matter of Federal Constitutional Law. If there is a Federal procedural violation, the usual remedy is remand to State officials for a hearing appropriate to the interest involved.

Damages, if awardable at all, would only be awarded for violation of Federal procedural rights. *Perry* v. *Sindermann*, 408 U.S. 593; 92 S.Ct. 2694; 22 L.Ed. 2d. 570 (1972) is a classic example. This Court held that whether or not the plaintiff had tenure and, thus, a "property" right was largely an issue of the State law of implied contracts. If State contract law provided a "legitimate claim of entitlement" to continuing employment, then the plaintiff had a "property" right.

Perry did not, however, take the logical jump urged by Petitioner in this case in fashioning a remedy. *Perry* did not hold, that if a property interest is found, then the Court must proceed to determine if there has been a breach of the employment contract and, if so, award money damages. Quite the contrary: the Court held

that the remedy was a hearing before college officials "where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603; 92 S.Ct. at 2700.

The cases cited by Petitioners, at page 19 of their brief, are not damage cases, but involve vindication of Federal procedural rights similar to those in *Perry*.

These procedural due process cases are entirely beside the point and have nothing to do with a damage action against individual State officials. Every one of the cases cited by Petitioners involves a situation where the plaintiffs are seeking injunctive or declaratory relief-to prospectively secure benefits which they allege have been conferred upon them by State law and of which they claim to have been deprived without due process of law. The purpose in each of these cases is to compel State officials to hold a hearing which could result in bestowing some prospective benefit on the Plaintiff, such as parole or more favorable conditions of confinement. None of the cases involved money damages for past violations of State laws.

Indeed, in most of the cited cases, a damage remedy would not even have been available because of the restrictions on Federal jurisdiction contained in the 11th Amendment. While there does not appear to be an 11th Amendment issue in this case, it is important to place the cases cited by Petitioners in their proper perspective. Procedural due process cases should not be cited as precedent for a money damage remedy when money damages were not even available in many of the cases cited by Petitioners.

In *Edelman* v. *Jordan*, 415 U.S. 651; 94 S.Ct. 1347; 39 L.Ed. 2d. 662 (1974), this Court held that the 11th Amendment barred a damage remedy against State

officials, sued in their official capacities, where the damages would be paid from the State Treasury. A Federal Court could only grant prospective relief by way of an injunction and had no jurisdiction to award compensation for past violations even if couched in terms of restitution.

Edelman would have barred money damages in most, if not all, of the cases cited by Petitioners. For example, an actual organ of State government was the principal defendant in *Kentucky Department of Corrections* v. *Thompson*, __ U.S. __; 109 S.Ct. 1904; 104 L.Ed. 2d. 506 (1989). Money damages were not at issue in that case and damages would not have been available under *Edelman* because damages would have been payable from the State Treasury.

Another indication that the cases cited by Petitioners do not allow money damages is the fact that mootness is a defense. For example, *see Connecticut Board of Pardons* v. *Dumbschat*, 452 U.S. 458; 101 S.Ct. 2460; 69 L.Ed. 2d. 158 (1981). The Court disposed of the mootness argument, at footnote 5, by observing that other representative plaintiffs had been substituted into the action and that two of them were currently serving life sentences and would be affected by the Judgment. The fact that the Court would even consider mootness as an argument is a strong indicator that these cases are not about damages, since mootness would not be an issue if someone is mainly seeking damages for a previous injury. The thrust of these cases is to remedy procedural violations where correcting the procedure may have some continuing effect on the plaintiff's situation.

Whatever the relevance of the cited cases, they most assuredly do *not* hold that one is entitled to recover damages, in Federal Court, for violation of a State regu-

lation that may create a Constitutionally protected liberty interest.

When the issue is damages, entirely different principles apply. The primary case which directly addresses the role of State law to damages in a procedural due process context is *Davis* v. *Scherer*, 468 U.S. 183; 104 S.Ct. 3012; 82 L.Ed. 2d. 139 (1984). There are two major holdings in *Davis*, one implicit and the other, explicit.

The explicit holding of the case was that violation of a State regulation had no relevance to the inquiry of whether a State official was entitled to qualified immunity for violation of Constitutional rights. Even if there was a clear-cut violation of a mandatory regulation, this would not defeat the claim to immunity.

Implicit in this Court's decision and acknowledged at footnote 11, is the related concept that violation of the State regulation is not directly actionable under 42 U.S.C. § 1983 and has no bearing on the claim of Constitutional right. The footnote makes it clear that State law is only relevant in determining whether a "liberty" or "property" interest exists. The focus, then, shifts to determining what Federally-mandated procedures will be imposed.

In *Youngberg* v. *Romeo*, in an unnumbered footnote, Justice Berger dismissed as frivolous, an argument that a plaintiff is entitled to enforce substantive State law in a § 1983 action. Justice Berger indicated that such a result would tend to blur the distinction between State and Federal law.

Even if Roseville Police Officers violated Michigan Department of Corrections regulations, that would have no bearing on whether there was a Constitutional violation or whether the officers are entitled to immunity.

If, on the other hand, Petitioners are not seeking damages for violation of Department of Corrections regulations, it is not clear what *procedural* rights Petitioners are seeking to vindicate. Respondents admit that DANESE had a *substantive* right that the officers not be deliberately indifferent to his medical needs. That right exists independently of the Department of Corrections regulations. If Petitioners are claiming that the regulations required medical screening to detect suicidal tendencies, Petitioners are just plain wrong.[7] Even if the regulations did so provide, Petitioners never specify which procedural rights were violated.

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[7] The rule dealing with inmate health care is cast in discretionary terms and does not make *any* provisions regarding psychological screening or suicide prevention. Even the initial decision of whether to refer the inmate to a physician is discretionary. The only mention of suicide in the rules merely requires more frequent visual observation. No guidance is given as to how a suicidal individual is to be detected. The full text of the relevant rules is set forth below:

1979 A.C. R. 791 657

> Rule 657. (1) The administrator shall insure that appropriate medical screening and health care is provided to inmates. The administrator shall develop a plan for provision of medical and health services to inmates. The plan shall be available to the commission for inspection.
>
> (2) Upon admission, provision shall be made to detect symptoms of narcotic addiction, diabetes, epilepsy, heart disease, chemical impairment, and the like. Immediate attention shall be given to persons in a stupor or comatose state.
>
> (3) An inmate shall be examined by trained medical personnel within a reasonable period of time if an inmate is visibly ill, chronically ill, on medication, complains of illness, or whenever it is suspected that medical attention is necessary. The administrator may use either the inmate's personal physician or any trained medical person. The extent of the examination or the need for additional examinations shall be at the discretion of trained medical personnel."

(*concluded on page 17*)

Indeed, it is difficult to conceive of any sort of a hearing that could have been provided in these circumstances. If the police officers were deliberately indifferent to DANESE's medical needs, they would have violated his 14th Amendment rights whether or not they gave DANESE a hearing or followed any other sort of procedure. That is because the rights involved in this case are substantive and not procedural.

There are no procedural due process claims involved in this case as Petitioners are not seeking a hearing, nor do Petitioners claim that any procedural rights were violated. Violations of the Department of Corrections regulations are not relevant to either damages or immunity. The Sixth Circuit was correct in analyzing this case under substantive due process principles. Petitioners' procedural due process arguments have no merit and should be disregarded.

II.

THE SIXTH CIRCUIT WAS CORRECT IN FINDING THAT THE FOUR INDIVIDUAL POLICE OFFICERS WERE ENTITLED TO IMMUNITY.

The Sixth Circuit held that the four individual police officers were entitled to immunity. Officers GOWSOSKI,

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(*continued from page 16*)

1979 A.C., R. 791.635

"Rule 635. (1) Visual supervision of each inmate shall be provided at least once every 60 minutes on a 24-hour basis and in high-risk areas on a more frequent basis.

(2) Provision shall be made to provide close visual supervision for an inmate who is potentially suicidal, mentally ill, or demonstrates unusual or bizarre behavior.

(3) Inmates shall be accounted for regularly by actual physical count taken by a facility employee at each shift change and as necessary."

CHUCHRAN, CARDINAL and KENYON defer to the analysis of the majority opinion of the Sixth Circuit Court of Appeals on the issue of qualified immunity. That Court correctly applied *Harlow* v. *Fitzgerald*, 457 U.S. 800; 102 S.Ct. 2727; 73 L.Ed. 2d. 396 (1982) and *Anderson* v. *Creighton*, 483 U.S. 635; 107 S.Ct. 3034; 90 L.Ed. 2d. 523 (1983). Those cases hold that local government officials, including police officers, are immune from damage suits unless they violate clearly established legal principles of which they should have been aware. Further, the legal principles have to be particularized to the circumstances of the case. In light of this legal standard, it is clear that Officers GOWSOSKI, CHUCHRAN, CARDINAL and KENYON were immune from suit.

The only law that was clearly established at the time of DANESE's death was that the officers could not be deliberately indifferent to DANESE's medical needs. If he was bleeding, in pain, or if he requested medical assistance, the officers had a duty to initiate steps that would result in medical attention being provided. Arguably, the officers were not entitled to be deliberately indifferent had DANESE made an unequivocal threat to kill himself, and had he appeared ready to immediately carry out the threat. However, as indicated by the Sixth Circuit, there was no particularized duty to screen DANESE for medical or psychological problems that were not readily apparent to a reasonable observer. There was, certainly, no particularized duty that a police officer with a high school education accurately diagnose a potential suicide when this cannot even be done with any degree of reliability by trained psychiatrists.

The police reports[8] show the involvement of each of the individual officers. When the correct Constitutional

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[8] See Footnote 2, *supra*.

standards are applied, it is clear that all four of the officers are entitled to qualified immunity.

OFFICER KENYON

Officer KENYON never saw DANESE while he was alive. Officer KENYON was called in from road patrol to relieve the personnel in the Communications Room for lunch. Officer KENYON was called to the cellblock area to cut DANESE down. Apparently, Petitioner is claiming that Officer KENYON had a duty to administer CPR to DANESE after cutting him down. However, Officer KENYON was not the supervisor in charge and the Fire Department ambulance arrived within minutes.

There is nothing in the record to indicate that Officer KENYON had either the authority or the training to administer CPR. Officer KENYON is entitled to qualified immunity.

OFFICERS GOWSOSKI AND CHUCHRAN

Officers GOWSOSKI and CHUCHRAN first made contact with DANESE when they responded to a call of a car parked in the middle of a residential street. Officer CHUCHRAN awoke DANESE, pulled the car to the side of the road, put the keys on the floor of the automobile and advised DANESE not to drive.

Later that evening, the same officers encountered DANESE driving the automobile. After stopping the vehicle and performing certain roadside sobriety tests, DANESE was placed under arrest for operating a motor vehicle while under the influence of intoxicating liquor. The officers were present during the booking process which included the administration of a breath test.

Both officers indicated that DANESE appeared to be in good spirits and was joking with another arrestee.

DANESE, at that time, did not make any threats to kill himself. Quite the contrary, when the officers tried to take his boots away, DANESE indicated that he could not commit suicide with his boots and he did not intend to do that anyway.

After DANESE was booked, both officers went home, because it was the end of their shift. Neither had any further contact with DANESE.

Perhaps a clinical psychiatrist would have picked up clues that DANESE was contemplating suicide when he joked about taking away belts and shoelaces and made other comments about suicide. However, there is no legal precedent that requires a first line police officer to possess the training of a clinical psychiatrist. The conduct of DANESE was consistent with a sophisticated criminal suspect who had been in jail before and who was familiar with jail and arrest procedures. In light of DANESE's apparent good spirits and the lack of any overt threats, it would be reasonable for a police officer to assume that DANESE did not need immediate psychological treatment or special suicide prevention measures. Officers GOWSOSKI and CHUCHRAN are entitled to qualified immunity.

OFFICER CARDINAL

Officer CARDINAL was the breathalyzer operator and was also assigned desk duty which included answering the telephone and dispatching.

Officer CARDINAL administered the breathalyzer test and was present during part of the booking process. DANESE talked with Officer CARDINAL about being $13,000 in debt and told CARDINAL, "I wish I wasn't here." Officer CARDINAL offered some encouragement to DANESE and then went about his duties.

Officer CARDINAL had no further contact with DANESE until he heard someone yelling and making noise in the cell area. DANESE demanded a cigarette and said if he didn't get a cigarette, he was going to hang himself. Officer CARDINAL told DANESE that smoking was against the rules and told DANESE to go to sleep.

Officer CARDINAL reported the threat to his supervisor.

Officer CARDINAL was told by his supervisors to watch DANESE, which Officer CARDINAL attempted to do by using the TV monitor. While the monitor was functional, there were some problems with the picture.

While making a visual check of the cell area, Officer CARDINAL found DANESE hanging in his cell with a shirt tied around his neck. Officer CARDINAL alerted his supervisor and assisted in cutting DANESE down. Officer CARDINAL then left to call the ambulance. He also opened the doors of the the police station, so that the ambulance personnel could have access to the cell area.

The only additional evidence that distinguishes Officer CARDINAL from Officers GOWSOSKI and CHUCHRAN is that he heard the ambiguous threat that DANESE was going to hang himself if he did not get a cigarette. Officer CARDINAL did just exactly what a reasonable police officer could be expected to do under the circumstances; he reported the threat to his supervisor. There is no evidence that Officer CARDINAL had the authority to abandon his other duties and maintain continuous visual surveillance upon DANESE. Also, the threat could be interpreted as merely an attempt by the prisoner to manipulate the officer,so that the officer could be persuaded to violate the no-smoking regulation of the lockup.

Officer CARDINAL is entitled to qualified immunity.

In light of the relevant legal standards established by this Court and in view of the facts, as contained in the police reports, the Sixth Circuit Court of Appeals was clearly correct in finding that these four individual officers were entitled to qualified immunity.

CONCLUSION AND PRAYER FOR RELIEF

There is no reason for this Court to review the decision of the Sixth Circuit. This case does not involve any novel issues of law that have not already been addressed by this Court. All of the lower courts who have considered the issue of jail suicide have applied the same legal test; namely, the deliberate indifference standard. Any perceived conflict amongst the lower court decisions would deal with the factual differences between the cases and not any disagreement as to the relevant law that applies. In fact, Petitioners' argument in this case really reduces to the argument that the Sixth Circuit erroneously construed the facts in a manner adverse to Petitioners. However, Petitioners' "facts," are not facts at all, but are mere arguments fabricated out of thin air. There is no need for this Court to review this case and Respondents GOWSOSKI, CHUCHRAN, CARDINAL and KENYON respectfully request that this Court not issue a Writ of Certiorari in this case.

Respectfully submitted,

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Dated: 2/22/90

No. 89-1049

In The

Supreme Court of the United States

October Term, 1989

JANET M. DANESE, Individually and as Personal Representative of THE ESTATE OF DAVID DANESE, Deceased; LOUIS DANESE, SR., DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE, and LOUIS DANESE, Individually,

Petitioners,

v.

THOMAS A. ASMAN, Individually and as Chief of Police of the City of Roseville; ROBERT PETERS, Individually and as Inspector for the City of Roseville; HOWARD HILL and FREDERICK STEIN, Individually and as Sergeants and Shift Commanders for the City of Roseville; STEVEN GOWSOSKI, ROBERT CHUCHRAN, DENNIS CARDINAL and RICHARD KENYON, Individually and as Police Officers of the City of Roseville,

Respondents.

PETITIONERS' REPLY

TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS ASMAN, PETERS, HILL AND STEIN AND TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS GOWSOSKI, CHUCHRAN, CARDINAL AND KENYON

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In The

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I.

PETITIONERS' REPLY TO RESPONDENTS', ASMAN, PETERS, HILL AND STEIN'S, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners object to the following eight (8) areas addressed by Respondents in their Reponse Brief.

1. On pages 9-10, Respondents set forth "Medical and Suicidal Precautions Implemented by Respondent Asman." Review of the Record below reveals that the identified "protocols" were not distributed by Respondent Asman until November 16, 1982, exactly one week after the death of Danese.[1] The record reveals that none of the Respondents were ever instructed to read, did read, or were ever trained in or tested on their knowledge of the identified protocols.[2] On March 30, 1978, Asman published five pages of Booking and Jail Procedures which required screening for suicidal tendencies.[3] However, the procedures were never distributed and the officers were never trained regarding identification of suicidal tendencies or suicide prevention.

2. Respondents contend that Asman's and Peters' involvement is limited to their failure to train their staff in suicide risk assessment and prevention and their failure to build a lock-up in conformity with mandatory regulations. Petitioners, however, alleged that Respondent Asman deliberately lied to the Department of Corrections[4] and that Asman and Peters, by failing to investigate the conduct of the officers involved in the 1977 suicide of Robert Frank or to initiate training, policies, procedures and/or disciplinary action, have condoned and/or ratified the unconstitutional acts of their officers, thereby establishing a policy of deliberate indifference to a pretrial detainee's constitutional

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[1] Asman Deposition testimony R 207, Plaintiff's Answer to Motion for Summary Disposition p. 729.

[2] Asman Deposition testimony and R 207, Plaintiff's Answers to Motion for Summary Disposition pp. 674-680.

[3] Reference is made to p. 22 of the Petition for Certiorari.

[4] Reference is made to p. 21 of the Petition for Certiorari.

right to medical attention and safe conditions of confinement.[5]

3. Respondents' characterization of Danese as a "manipulative inmate"[6] and Respondents' argument that Danese made no "unequivocal threat" to commit suicide are unfounded. The record below is devoid of any evidence or testimony, expert or otherwise, to suggest that Danese's threat was other than a sincere cry for help, a genuine threat of self-harm. It is obvious that Sgt. Hill considered Danese's threat serious, as he stated, "We better watch him."

4. Respondents suggest no less than twelve (12) times that Petitioners are seeking to have this Court establish that as early as 1982, a lay police officer was constitutionally required to "diagnose" a pretrail detainee's condition and then to "treat without request".[7] What Petitioners seek is this Court's determination that Respondents are not protected by qualified immunity and may be personally liable for the deliberate indifference manifested by them to Danese's constitutional right to medical attention and safe conditions of confinement.[8] On November 14, 1978, the Department of Corrections provided Asman with a "Receiving Screening Form and the AMA Practical Guide to Implement Medical and Health Services in Jails." Question number 9 on the Receiving Form received by Asman asks, "Does the inmate's behavior suggest the risk of suicide?" To answer the question,

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[5] Reference is made to p. 18, n. 23 and p. 21 of the Petition for Writ of Certiorari. R 208 Second Amended Complaint, pp. 162-167.

[6] Reference is made to pp. 14 and 21 of Respondent Asman's Response Brief.

[7] Reference is made to pp. 16 through 26 of Respondent Asman's Response Brief.

[8] See n. 23, Petition for Writ of Certiorari.

the booking officer must be trained. None of the Respondents were ever trained in medical intake screening for suicidal tendencies. If the Respondents had been trained they would have been told, "Answer YES if the inmate talks about killing himself, even if he just seems to be joking" or if the inmate seems very depressed or talks about not caring about things any more.[9] The AMA Training Manual provided Respondent in 1978 recognized that it is not the booking officer's "job to *diagnose* mental illness or emotional disturbances." [10] Petitioners do not seek to hold lay police officers to an impossible standard of diagnosing who will and will not commit suicide. Petitioners seek to hold the Respondents liable for their failure to medically screen Danese or render any medical care after he was cut down. Danese was not placed in a detoxification cell as required by Michigan Law and was not monitored. If the Respondents had not exhibited deliberate indifference to Danese's serious medical needs[11] and his right to safe conditions of confinement, Danese would be alive today.

5. Respondents' contentions that Danese was properly held in a holding cell is false. Respondents are well

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[9] AMA Manual for Training of Jailers In Receiving Screening and Health Education 1978, National Institute of Corrections, Bureau of Prisons, US Department of Justice Grant.

[10] The purpose of receiving screening is to provide some initial insight into an inmate's physical, mental or emotional condition. The officer is informed, "obviously, you cannot make a *diagnosis* of an inmate's condition during booking, but you should know the obvious things to look for in order to decide whether to answer yes or no to particular question. Remember, . . . you cannot *diagnose* the condition . . . it might be more serious than you think." Therefore, if a doubt exists the inmate should not be accepted until he is medically cleared.

[11] Asman admits the threat of suicide is medical emergency. *Robert* v. *City of Troy*, 773 F2d 720 (6th Cir. 1985). Recognized, "Indeed, suicidally inclined inmate is in need of medical attention."

aware that MCLA 791.555 mandates that Danese be housed in a detoxification cell until he could care for himself.[12] Respondents cannot reconcile their contention that Danese was not detoxifying and could properly care for himself with Respondent Hill's refusal to release Danese on bail until he sobered up and Hill's determination that Danese required constant visual observation.

6. In support of Petitioner's position that the Michigan Administrative Regulations were the minimum mandatory standards, Petitioner cites this Court to *Young* v. *The City of Ann Arbor,* 119 Mich App. 512, 326 NW2d 547, decided on September 21, 1982, which held, "... in light of our finding that the Ann Arbor facility was required to follow the Department's rules, the Trial Court erred in denying Plaintiff's request to instruct the jury on the mandatory applicability of the supervisory rules." *Id* at 550. In continuing, the Court provided, "Since we find that the Ann Arbor facility was required to follow the Department's rules, it was incumbent upon Krasny [The Chief of Police] to enforce the regulations." *Id* at 550. *Davis* v. *Detroit,* 149 Mich App 249, 386 NW2d 169 (1986), *lv den* 426 Mich 856 (1986); *Hickey* v. *MSU,* 177 Mich App 606, 443 NW2d 180 (1989); *Smith* v. *Yono,* 613 F. Supp. 50 (1985).

7. Respondents' reliance upon the fact that since 1977 all Michigan police officers, with limited exceptions, must be "academy trained ... including first aid"

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[12] Reference is made to Appendix p. F-2, attached to Petition for Certiorari. Reference is also made to R 207, Plaintiff's Answer to Motion for Summary Judgment pp. 871-873. In the memorandum of June 20, 1980, the Department of Corrections advised Respondent Asman to place a person who threatens suicide in the detoxification cell, increase cell supervision or convey the intoxicated, suicidally-inclined detainee to a detoxification center to ensure appropriate medical care.

is unfounded. The record shows that none of the Respondents on duty on November 9, 1982, had been trained.[13] That Respondents knew the law of arrest is not in dispute. Respondents are being sued for not knowing the law of detention. They simply did not know what to do with Danese once they had him. Accordingly, they did nothing. Danese was denied the evaluation process, the inmate classification process, and illegally housed in a facility which was illegal for all purposes under Michigan law.

8. Respondents claim that Petitioners seek "more training or better training" is unfounded.[14] Critical to this discussion is the fact that the procedures of March 30, 1978, were never distributed, read or followed by any of the Respondents. Respondents, by their incarceration of Danese, had an affirmative constitutional duty to provide for his serious medical needs and provide for safe conditions of confinement. Respondents exhibited nothing but deliberate indifference toward Danese. They must not be afforded immunity.

II.

PETITIONERS' REPLY TO RESPONDENTS', GOWSOSKI, CHUCHRAN, CARDINAL AND KENYON'S, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents agree with Petitioners that deliberate indifference to a serious medical need of a pretrial detainee constitutes a substantive due process viola-

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[13] Reference is made to p. 21 of Petition for Writ of Certiorari and n. 33.

[14] Reference is made to pp. 21-22 of the Petition for Writ of Certiorari and n. 35.

tion.[15] In *Ky. Department of Corrections* v. *Thompson*,[16] this Court recognized that the use of "explicitly mandatory language" in connection with the establishment of "specific substantive predicates" to limit discretion create a liberty interest.[17] This Court's review of Appendix F attached to the Petition for Certiorari will reveal the Michigan legislature's utilization of the explicitly mandatory language, "shall." This language, taken in connection with the specific substantive predicates,[18] limits Respondents' discretion and creates a liberty or expectation interest in the policies, procedures or process to be utilized in

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[15] Respondents Gowsoski, Reply Brief, p. 16.

[16] 490 US —, 104 L Ed 2d 506, 109 S Ct. — (1989)

[17] *Id* at 104 L Ed 2d 516-517.

[18] 791.5511(1):

> "a facility shall comply with the requirements of the rules . . .";

791.555(1):

> "A . . . lockup . . . shall have . . . electronic monitoring . . .";

791.555(1):

> "A . . . lockup shall provide one or more detoxification cells";

791.555(7):

> "The cell . . . shall be located near a guard station in order to insure proper supervision . . .";

791.635(2):

> "Provision shall be made to provide close visual supervision for an inmate who is potentially suicidal . . .";

791.642(1):

> "A facility administrator shall provide a basic plan for classifying inmates";

791.657:

> "The administrator shall insure the appropriate medical screening and health care is provided to inmate."

(Emphasis added).

determining who requires medical attention, the scope of the attention and what constitutes constitutionally safe conditions of confinement on a case-by-case basis.

Because Respondents had no policies, procedures or plans to classify inmates, no medical intake screening and no training,[19] Danese was denied the very process [hearing/screening] mandated by law to determine the extent of his medical and personal security needs. Recognizing the Respondents' awareness[20] of Danese's threats, of his mental and physical condition, and Respondents refusal to implement any precautionary measures to protect suicidally inclined detainees, despite their awareness of the mandatory nature of the jail rules,[21] the inmate classification and medical screening requirements of the rules and the AMA, Respondents cannot be said to have exhibited anything other than deliberate indifference, gross negligence and professionally unacceptable judgment toward Danese. Accordingly, qualified immunity must be denied.

RELIEF REQUESTED

Whether an incarcerated, intoxicated pretrial detainee who manifests suicidal ideations by threats or otherwise, has a constitutional right to be protected by his custodians from suicide is a question of national importance not previously addressed by this Court. As the resolution of this important issue will directly impact

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[19] See the last paragraph on p. 12 of the Petition for Writ of Certiorari.

[20] See the statement of the case in the Petition for Writ of Certiorari.

[21] Asman admitted rules were mandatory and goverened the operation of his facitily. R 207 Answer to Motion for Summary Judgment, pp. 749 and 765.

the operation of every jail lockup and security camp in the nation, Certiorari must be granted.

Respectfully submitted,

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